S. HRG. 100-930

STATE TAXATION OF INTERSTATE TRANSPORTATION

HEARING

BEFORE THE

SUBCOMMITTEE ON SURFACE TRANSPORTATION

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

STATE TAXATION OF INTERSTATE TRANSPORTATION

SEPTEMBER 16, 1988

Printed for the use of the
Committee on Commerce, Science, and Transportation

U.S. GOVERNMENT PRINTING OFFICE

91-521 O WASHINGTON : 1988

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S261-16

91-521 O - 89 - 1

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ERNEST F. HOLLINGS, South Carolina, *Chairman*

DANIEL K. INOUYE, Hawaii
WENDELL H. FORD, Kentucky
DONALD W. RIEGLE, JR., Michigan
J. JAMES EXON, Nebraska
ALBERT GORE, JR., Tennessee
JOHN D. ROCKEFELLER IV, West Virginia
LLOYD BENTSEN, Texas
JOHN F. KERRY, Massachusetts
JOHN B. BREAUX, Louisiana
BROCK ADAMS, Washington

JOHN C. DANFORTH, Missouri
BOB PACKWOOD, Oregon
NANCY LANDON KASSEBAUM, Kansas
LARRY PRESSLER, South Dakota
TED STEVENS, Alaska
ROBERT W. KASTEN, JR., Wisconsin
PAUL S. TRIBLE, JR., Virginia
PETE WILSON, California
JOHN MCCAIN, Arizona

RALPH B. EVERETT, *Chief Counsel and Staff Director*
WALTER B. MCCORMICK, JR., *Minority Chief Counsel and Staff Director*

SUBCOMMITTEE ON SURFACE TRANSPORTATION

J. JAMES EXON, Nebraska, *Chairman*

DONALD W. RIEGLE, JR., Michigan
JOHN D. ROCKEFELLER IV, West Virginia
ERNEST F. HOLLINGS, South Carolina
BROCK ADAMS, Washington

ROBERT W. KASTEN, JR., Wisconsin
BOB PACKWOOD, Oregon
LARRY PRESSLER, South Dakota
NANCY LANDON KASSEBAUM, Kansas

CONTENTS

	Page
Opening statement by Senator Exon	1
Opening statement by Senator Kasten	2
Opening statement by Senator Packwood	3
Opening statement by Senator Adams	83

LIST OF WITNESSES

Berg, George L., Jr., assistant director, national affairs division, American Farm Bureau Federation	29
Blangeres, Robert F	88
Prepared statement	89
Boehm, John, Nebraska State tax commissioner	14
Prepared statement	15
Questions of Senator Exon and the answers	22
Briggs, Richard E., executive vice president, Association of American Railroads	38
Prepared statement	40
Letter of Ocotober 13, 1988	47
Donohue, Thomas J., president and CEO, American Trucking Assn., Inc	49
Prepared statement	51
Questions of Senator Exon and the answers	59
Farrell, Joseph, president, American Waterways Operations	70
Prepared statement	71
Questions of Senator Exon and the answers	72
Heitkamp, Heidi, on behalf of the Multistate Tax Commission	4
Prepared statement	7
Questions of Senator Exon and the answers	11
Kennedy, James J., Jr., executive secretary-treasurer, Railway Labor Executives' Assn.; accompanied by D.L. Lindsey, vice president and national legislative representative, Brotherhood of Locomotive Engineers; and James M. Brunkenhoefer, national legislative director, United Transportation Union	87
Landry, James E., senior vice president and general counsel, Air Transport Association of America; accompanied by David West, director of taxation	61
Prepared statement	63
Questions of Senator Exon and the answers	64
Robinson, Ron, member, Local 690, International Brotherhood of Teamsters	91
Prepared statement	92
Ryles, Nancy, on behalf of the National Association of Regulatory Commissioners	23
Prepared statement	26
Verkler, Jerry T., senior vice president, Interstate Natural Gas Association of America	65
Prepared statement	67
Questions of Senator Exon and the answers	69
Letter of October 12, 1989	78

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

American Movers Conference, statement	106
Barber, Richard J	127
Bartley, James E., executive vice president, National Industrial Transportation League, letter	114
Evans, Robert D., American Bar Assn., letter	118

Karnes, Hon. David K., U.S. Senator from Nebraska, statement 97
LaFaver, John D., director, Montana State Department of Revenue, letter 112
Mofford, Hon. Rose, Governor, State of Arizona, statement 99
Munn, Richard A., director, Oregon Department of Revenue, letter 111
National School Boards Assn., statement 102
Pirages, Suellen, director, Chemical Waste Transportation Council, letter 119
Rhinehart, N., Jr., corporate vice president, tax planning and compliance, American Telephone & Telegraph Co., statement 103
Riley, Hon. John H., Administrator, Federal Railroad Administration, DOT, letter 124
Scheppach, Raymond C., executive director, National Governors' Assn., letter 116

STATE TAXATION OF INTERSTATE TRANSPORTATION

FRIDAY, SEPTEMBER 16, 1988

U.S. SENATE,
SUBCOMMITTEE ON SURFACE TRANSPORTATION,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:31 a.m., in room SD-628, Dirksen Senate Office Building, Hon. J. James Exon (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: Robert Holleyman, staff counsel; Sheryl Webber Washington, professional staff member; and Alan Maness, minority staff counsel.

OPENING STATEMENT BY SENATOR EXON

Senator EXON. The subcommittee will please come to order.

This morning the Surface Transportation Subcommittee is holding a hearing on the subject of state taxation of interstate transportation. I called this hearing for several reasons.

The first involves a situation where there has been a great impact on my state and other states with regard to recent activities. I am referring to two court challenges brought against the personal property tax levied on business equipment by the Nebraska local governments. These suits were initiated by Trailer Train, a company which owns railroad cars, and also three major railroads: Burlington Northern, Union Pacific, and Chicago Northwestern railroads.

All of these parties relied upon certain provisions contained within the Railroad Revitalization and Regulatory Reform Act of 1976, commonly known as the 4-R Act, which were intended to eliminate discriminatory state and local taxation of interstate railroads.

Counties, municipalities, and school districts across the State of Nebraska and elsewhere have been adversely impacted as a result of the successful challenges brought against our state's and other states' personal property tax laws. Those political subdivisions faced a sudden shortfall in Nebraska of anticipated revenue for the 1987 tax year. Most of this occurred after the anticipated receipts for the tax year were already budgeted. The collective impact of this was the loss of as much as $13 million in Nebraska alone for the 1987 tax year. It is, therefore, understandable why this is such a big issue in many states.

I have not scheduled this hearing to look solely at my state and the railroads. Rather, I have scheduled this as a fact-finding hearing, looking at both the impact of Federal laws and the effect of the way in which states may tax interstate transportation and the impact of present state policies on the different transportation modes in interstate commerce.

I am also interested in looking at the present Federal laws to see whether there is a rationale for treating each of the transportation modes differently under Federal law.

While I have limited this morning's hearing to interstate transportation issues, there may also be other interstate businesses where the same problems and issues exist. For example, interstate telecommunications may be another such area.

As Members of the Senate and particularly as members of this committee, we have an obligation to help ensure the free flow of interstate commerce as intended by the drafters of the Constitution. For this reason, Congress has historically enacted legislation to minimize regulations that would adversely impact the flow of goods across the Nation. It is my understanding that this was the basis of the 4–R provisions as well as similar laws for the benefit of motor carriers and airlines.

The railroad, trucking and airline industries came before Congress and argued that many state and local tax laws discriminated against their industries and interstate commerce. It is my understanding that they continue to feel this way for which reason they support current Federal laws on this subject.

In addition, new or stronger Federal laws are also being sought by industries with either no current Federal protections or protections that they feel should be stronger.

In planning for this morning's hearing, it has been evident that the issue of state taxation of interstate commerce is an issue of tremendous importance to both states and industry. We have had more requests to testify than our schedule would accommodate for which reason a number of interested parties are submitting their testimony for the record. And without objection, at this time I would ask unanimous consent that those statements of those interested parties submitting testimony be accepted as a part of the record.

We have been joined by our friend and colleague, Senator Kasten from Wisconsin. Do you have any opening statements, Senator Kasten?

OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. Mr. Chairman, I first of all thank you. This is an important issue, and I think also it is a timely hearing because the issue is currently being debated in the courts, in state legislatures and right here in Congress.

Resolving this debate is going to require careful weighing of competing interests. The states have a legitimate interest in collecting taxes from interstate transportation companies that operate in their states. If the states are not permitted to collect fair taxes from these operators it can cause revenue shortfalls requiring cut backs in services.

On the other hand, the ability of our planes, trains, trucks, buses, pipelines and barges to operate across state lines without facing unfair taxes is important to a healthy economy. Concern about unfair state restrictions on interstate commerce was one of the motivating forces for the creation of the U.S. Constitution. The Constitution gives Congress extensive power to stop unfair state restrictions on interstate commerce and we have enacted laws to prevent such restrictions.

This issue all comes down to a question of fairness. Interstate transportation providers should pay their fair share of state taxes and there should be a fair process for deciding the amount they must pay.

But I look forward to hearing the testimony. This is a complicated issue. But I congratulate you on beginning these hearings.

Thank you.

Senator EXON. Thank you, Senator.

I believe, however, that in scheduling witnesses to appear at today's hearing, we have assembled a group of experts who should be able to provide us with a broad cross section of interests and good overview on all of these issues.

The first of today's panel is comprised of state and local representatives who have a keen interest in legislation that affects their ability to tax transportation industries. This panel includes John Boehm, the Tax Commissioner of the State Nebraska. I am pleased that John could come here today to testify about what has occurred in my own state.

The second panel scheduled for this morning consists of transportation industry witnesses representing the railroads, motor carriers, airlines, natural gas pipeline and barge industries.

We also have included a third panel at the request of my good friend and a member of the subcommittee, Senator Brock Adams. This panel represents transportation workers concerned with an issue of state taxation of their incomes. I understand that this is an issue of particular concern to rail workers and truck drivers in Washington State, and I am pleased that we could add this panel of witnesses to address this issue.

We have a full plate to consider this morning. And so, with these remarks, I will call upon my friend and colleague from the great State of Oregon, Senator Packwood, who I know had a great deal to do with the 4-R Act when it passed. Senator Packwood.

OPENING STATEMENT BY SENATOR PACKWOOD

Senator PACKWOOD. Mr. Chairman, thank you.

I have no desire to interfere with the wise tax policies of the states or even unwise tax policies, as the case may be. But I want to make sure that we are not seeing a gradual effort to undo some of the deregulation we have done at the Federal level by doing it up again through tax policies at the state level, and that can be done in many fashions.

But short of that, if the states choose to tax some utilities one way and others another, I am not sure we ought to interfere with that policy so long as it does not trample on an effort at uniform national interstate commerce.

And with that, Mr. Chairman, I am looking forward to hearing your witnesses. I will have to leave about 10:10 for a meeting on welfare reform, but I look forward to staying here for a while.

Senator EXON. Thank you, Senator. I would like to assure you that this is an oversight hearing to begin to look at the problems that have been raised in several quarters. At least from the standpoint of this Senator, it is not an attempt to re-regulate any sections of the industry.

But as you know, we have had some concerns spoken out on by many Members of the Senate, including some of us who feel that there may not be the proper interpretation of the Staggers Act and other things that affect this industry.

But I share your overall position. I did not intend this hearing to begin a move to re-regulate industry.

Thank you for those comments.

We will start then and call our first panel: Commissioner Heidi Heitkamp, State Tax Commissioner for North Dakota; second, John Boehm from the Nebraska State Tax Commissioner's Office, as I had mentioned earlier; Commissioner Nancy Ryles, Oregon Public Utilities Commission; Mr. George L. Berg, Assistant Director for National Affairs for the American Farm Bureau. If we could ask those four witnesses to please take their places.

I want to thank each of you for coming here, many long distances, which indicates the importance of this issue to the fine organizations that you represent.

Senator PACKWOOD. Could I personally welcome Commissioner Ryles? Nancy Ryles is an old friend of mine of 30 years standing. We have known each other long before either of us were in politics. I was subsequently in the state legislature. She was in the state legislature and then in the state senate. And then our new governor, Governor Goldschmidt, has appointed her to the Public Utilities Commission last year, and she had to give up her senate seat, which is a loss for the Republicans in the State of Oregon, but a gain for the utilities commission. I am delighted to have you here this morning, Nancy.

Ms. RYLES. Thank you, Senator Packwood.

Senator EXON. Ms. Ryles, I take it that my friend and colleague is trying to associate you with his same age group. It doesn't look that way to me.

Let the record speak for itself. Ms. Ryles, welcome.

Ms. RYLES. Thank you.

STATEMENT OF HEIDI HEITKAMP, NORTH DAKOTA STATE TAX COMMISSIONER ON BEHALF OF THE MULTISTATE TAX COMMISSION

Ms. HEITKAMP. Mr. Chairman and members of the subcommittee, my name is Heidi Heitkamp. I am the Tax Commissioner for the State of North Dakota, and I am currently serving as chair for the Multistate Tax Commission.

I am appearing here today on behalf of the Multistate Tax Commission and the Federation of Tax Administrators. Those of you who are familiar with state groups may remember that group as

NATA. The Federation of Tax Administrators represents 50 state governments and the District of Columbia.

Briefly noted, the purpose of the MTC is to bring further uniformity and compatibility to the tax laws of the states insofar as those laws affect multistate businesses; to provide a forum for business and states to work out tax problems; and to study and make recommendations with respect to all taxes affecting multistate businesses; and to assist in protecting the fiscal and political integrity of the states.

The Federation was formed to advance the techniques and standards of state tax administration. Through a variety of research and training activities, the Federation works to promote uniformity in the administration of taxes and to shape Federal, state and local legislation that will foster effective and fair tax administration.

I greatly appreciate the opportunity to appear before you today and to offer some testimony on the property tax provisions of the 4–R Act and related laws.

I do want to note for the record that the National Governors Association—Ray Scheppack, NGA's executive director—has submitted a letter for the record and outlines a number of concerns that the National Governors Association has, most of which are expressed either in our testimony or the testimony of the other members of this panel.

Senator EXON. Ms. Heitkamp, let me just agree, without objection, to the acceptance of the letter.

I also want to say that the full statements of you and others who will testify on this panel and others, without objection are accepted for the record.

Thank you.

Ms. HEITKAMP. Thank you, Mr. Chairman.

I am going to very briefly summarize my testimony and then defer to the rest of the members of the panel who have probably more information on the direct impacts.

Briefly, our concern is that property tax provision of the 4–R Act and related property tax provisions in other legislation, like the airline legislation and the potential of expanding this to the pipelines, are troublesome for three reasons.

The first reason is the property tax provision in the 4–R Act was an effort by the Federal Government to provide property tax relief to financially troubled railroads, not to rewrite 200 years of case law and common law surrounding state property tax. I think that the intent was to help a troubled industry, and at the final hours of that legislative effort, there was a provision which was included which said "all other discrimination." It is that provision, which was not heard during the debates on the 4–R Act, that is giving the states the most trouble.

Second, the intent of the property tax provision was to prohibit alleged discriminatory practices in assessment ratios and rates. Our reading of the legislative history would indicate that there is very little which talks about interfering with the factual determination of what is, in fact, the system-wide value of utilities and transportation property.

The third concern is that all-encompassing "any other discrimination" has been read to include other types of taxation, not just

property taxation. Consequently, the states' ability to arrive at what they consider reasonable classifications is greatly limited in the case of the railroads. If you want to take a look at an example, I think the commissioner from Oregon is going to have some interesting things to say in terms of regulatory fees.

I want to just say, now that we are getting close to my three minutes here, that I really—and I think the groups that I represent—believe that the state tax administrators have a responsibility for fair and equitable taxation in this area, and we are not attempting at all to say that there are no avenues for evaluation or for revisiting valuation methods that the states have currently in place.

The Western Association of State Tax Administrators has undergone a massive project to develop uniform valuation methods for centrally assessed property. Now, through the MTC, we are looking at those valuation methods to try to develop some standards nationwide, and that hopefully will promote uniformity, which is one of the purposes of the MTC, and alleviate some of the problems.

But the fundamental concern—and I think this is a concern expressed in the National Governors Association letter—is that at some point the states, through the federalism process have to have the ability to adjust and modify their state tax system and be responsive to the concerns.

Now, you are probably going to hear testimony to the effect that the states don't ever listen and that centrally assessed utilities are a captive audience. Consequently, these transportation companies and utility companies are in a unique position of not being able to pick up their track and leave or pick up their facilities and leave. I want to leave you with a couple of examples of where I think the states have been responsive to concerns of these types of industries.

The example is in my home State of North Dakota. We were one of the first states, because of the ease of getting through the Federal litigation process, to litigate one of the 4–R's cases. We were also one of the first states to litigate the question of whether the state could assess property taxes on airline property if they did not assess personal property taxes on other commercial facilities.

We were unsuccessful in that litigation. Our North Dakota Supreme Court said we could not, consistent with the airlines' 4–R type provision, continue to tax aircraft—personal property tax of aircraft.

When the South Dakota decision came down in the United States Supreme Court, our attorney general reinstated our law which had never been amended off the books.

The airlines, in conjunction with the municipal airports in conjunction with the tax department, came into the legislature and said, "We think it has worked fine the way it has been, and we don't think we need to reinstate this. We don't think that this is going to be a problem." The legislature was responsive to that and said, "In order to encourage the development of municipal airports, we will listen to that concern."

The other area of concern is worldwide unitary where Congress discussed what Congress was going to do to remedy the worldwide problems. Thirteen states within the time period—or 12 states of the 13—within the time period of not more than 2 years, amended

their worldwide unitary law in response to concerns by foreign nationals and the Congress.

So, the point is that the states can be responsive if given an opportunity and that this type of legislation has definitely had an adverse impact on our local and city and municipal governments.

And as you here are very familiar with, it is time for a little oversight on this provision to find out what the consequences have been. I greatly applaud your efforts, Senator Exon, in this area. I think it is time to open the dialogue.

[The statement and questions and answers follow:]

STATEMENT OF HEIDI HEITKAMP, NORTH DAKOTA STATE TAX COMMISSIONER, ON BEHALF OF THE MULTISTATE TAX COMMISSION AND FEDERATION OF TAX ADMINISTRATORS

Mr. Chairman and Members of the Subcommittee:

My name is Heidi Heitkamp. I am the Tax Commissioner for North Dakota and the Chairman of the Multistate Tax Commission. I am appearing here today on behalf of the 29 member and associate member states of the Multistate Tax Commission and the Federation of Tax Administrators, representing 50 state governments and the District of Columbia. Briefly stated, the purpose of the MTC is to bring further uniformity and compatibility to the tax laws of the states insofar as those laws affect multistate business; to provide a forum for business and states to work out tax problems; to study and make recommendations with respect to all taxes affecting multistate businesses; and to assist in protecting the fiscal and political integrity of the states. The Federation was formed to advance techniques and standards of tax administration. Through a variety of research and training activities, the Federation works to promote uniformity in the administration of taxes and to shape federal, state, and local legislation that will foster effective and fair tax administration. I appreciate the opportunity to appear before you today to offer testimony on the property tax provision of the 4-R Act and related laws.

Today, my statement addresses the harmful consequences the states, local governments and school districts have experienced because of the impact of the discriminatory tax provision of the 4-R Act. Three major misunderstandings of the property tax provision have caused considerable damage by effectively granting budget-busting special privileges to selected large property owners which are not available to other classes of taxpayers.

First, the property tax provision was an effort by the federal government to provide tax relief to the financially troubled railroads, not to rewrite 200 years of state property tax laws or to give tax breaks to all transportation carriers. Second, the intent of the property tax provision was to prohibit alleged discriminatory practices in assessment ratios and rates, not to ask federal judges to take over the technical job of property valuation from professionally trained appraisers. Third, the property tax provision was aimed at property taxes, not all state taxes, exemptions, and fees.

A 1987 U.S. Supreme Court decision and *recent federal legislative efforts will increase discrimination* in application of the property tax, diminish the states' ability to assure uniformity and fairness within state tax systems, and create budgetary havoc for local governments and school districts.

CONGRESS INTENDED NARROW SUBSIDY FOR RAILROADS, NOT ALL OUT ATTACK ON STATE AND LOCAL TAX SYSTEMS

The discriminatory tax provision was included in the 4-R Act due to special circumstances surrounding the railroad industry in the 1960s and 1970s. It is important for any discussions of this provision to re-visit the legislative climate during debate on 4-R. The 4-R Act was the result of 15 years of lobbying by the financially troubled railroad industry to obtain financial relief from the federal government. The railroads asked for relief through subsidies, loans, and tax breaks from Congress. Initial efforts at property tax relief focused on exempting railroad rights-of-way from property taxation. later, the railroads switched their efforts to state tax policies on rates and classification of railroad property.

From 1961 to the passage of the 4-R Act in 1976, numerous bills were introduced which would have reduced state and local taxes on railroad property. During the early debates, reservations about proposed restrictions were raised by members of the committees and by federal agencies who submitted comments. In particular, the

U.S. Department of Commerce, even though they endorsed the concept of non-discrimination, *voiced opposition* to early attempts at restrictive legislation in a 1966 statement:

"The Department, however, recognizes that there are difficulties of a tax administration and lack of experience with Federal legislation of this kind * * * the Department of Commerce would not recommend the enactment of the bill * * * ."

The final product, the property tax provision of the 4-R Act, was an effort by the federal government to aid the railroads with state rather than federal dollars. It was an easy target for Congress because it required no federal funds, was an issue unanimously agreed to by the railroads, and was a small issue in comparison to the larger railroad-restructuring at the heart of the 4-R Act.

Proponents of the section said it was intended to prohibit alleged discrimination of state taxation in rates and assessments of railroad property. In fact, it does much more. It grants the railroads the privilege of bypassing state administrative and court reviews and going directly into federal court. It allows the railroads to be granted injunctive relief while their cases are pending. Further, it opened the door for increasing federal government intervention into state taxing powers.

EXPANSION OF FEDERAL INTERVENTION COULD HIT $160 BILLION IN STATE-ASSESSED PROPERTY

Despite the fact the railroads were granted tax relief because they were on the verge of bankruptcy, other transportation carriers believed they too should receive similar tax privileges. The motor carriers in 1980 and the airlines in 1982 were successful in receiving similar benefits. However, they did not receive the whole array of privileges granted to the railroads. In particular, they did not receive the catch-all provision that provides 4-R type property tax relief to all forms of taxation.

Now, the interstate natural gas pipeline, electric utility, and telecommunication industries are asking for similar tax breaks. We are no longer dealing with one troubled transportation industry, but essentially all state assessed transportation and utility property. According to Census Bureau data, *state assessed property values totaled close to 160 billion dollars in 1981.*

The stakes are high for the states and local governments that would lose tax revenues if the special privileges of the 4-R Act are extended to other large property owners. Well over half of the states stand to lose tax revenues. For instance, Kansas and South Dakota are two of the states identified by AT&T where they would seek tax breaks. Ten states, including Louisiana, Tennessee, and Nebraska could potentially lose nearly $400,000,000 if the electric utilities are granted tax breaks. If the interstate natural gas pipelines are granted 4-R tax relief, 11 states could lose a total of $67 million dollars in tax revenues.

The interstate natural gas pipelines are promoting a bill pending in the House that would grant them 4-R type tax relief. At an April hearing this year, the MTC challenged the assertion by the pipelines that 11 states were practicing discriminatory property taxation. We surveyed 11 states and found that pipeline supporters had not correctly reported actual practices in many of the states. As importantly, in most of the states, the *pipelines have not sought either legal or legislative review of their allegations of unfair treatment.* It is apparent that the interstate natural gas pipelines believe they are entitled to new local tax breaks just because the railroads, motor carriers, and airlines, with which they are *not* in significant competition, received them.

If Congress wants federal judges to value property for state and local taxation, why limit discussion of preferential treatment to just *interstate* transportation carriers and utilities? Why not expand the discussion to include all interstate businesses, or all utilities for that matter? What distinguishes these industries from other companies? Where do you draw the line between those industries that should receive special privileges and those that don't? This state of confusion destabilizes states' tax bases because the federal government is superceding the states' taxing authority.

LEGISLATIVE HISTORY IS CLEAR: CONGRESS INTENDED 4-R ACT TO COVER ASSESSEMENT RATIOS AND TAX RATES, NOT VALUATION METHODS

During the 4-R debates on the property tax provision, the railroads testified repeatedly that their concerns were focused on tax assessment ratios, classification systems and rates, *not* on valuation of railroad property. This is significant because it was a key issue during the litigation of the recent 4-R Supreme Court decision in *Burlington Northern* v. *Oklahoma Tax Commission* which dismissed the legislative history as irrelevant.

For example, James Ogden, representing the American Association of Railroads said in 1964 House hearings:

"The principal problem in the manner of railroad assessments is not one of how to valuate a railroad. In the hundred year history of railroad taxation, the practice of valuing railroads for tax purposes has reached a substantial degree of refinement."

Later, in a 1970 hearing, then-Representative, now-Senator Brock Adams and a member of this Subcommittee, questioned whether the bill covered "both valuation and assessement." Phillip Lanier, representing the *Association of American Railroads* replied that the bill did *not* cover valuation issues:

" * * * Because *we are speaking in terms of uniformity of the equalization ratio, not uniformity of the result in dollars of value* or in dollars of tax, but only that once the fair market is determined, the equalization ratio will be the same. * * * That is all this bill requires and that is all we ask for." (emphasis added)

Since the property tax provision went into effect in 1979, the railroads have pursued litigation to broaden the interpretation of the property tax provision to include valuation. Those efforts culiminated in the 1987 U.S. Supreme Court decision in *Burlington Northern* v. *Oklahoma Tax Commission*. In that decision, the *Court ruled* in favor of Burlington Northern's contention that the *legislative history* of the property tax provision of the 4-R Act *was irrelevant*, and that the Court could consider property valuation issues.

Widening the federal courts' authority to review valuation of railroad property is taking a gigantic leap into state taxing authority. Property taxation is a state and local matter. The federal government does not tax property. However, the federal courts find themselves with the new job of being property tax appraisers. Property valuation for major property owners is a complicated process that requires considerable knowledge of economics, appraisal methods, accounting practices, and tax systems. A thorough working knowledge is critical because valuation issues are more esoteric than simply comparing tax rates and classification systems.

Valuation cases involve volumes of information on valuation methods resulting in lengthy court cases. Consequently, considerable resources must be devoted to trying these cases, and the states are in no position to compete with the well-financed railroad layers. The *states are essentially going through the valuation process twice, once for their own appraisal purposes and then for the federal judges, the "new appraisers"*. The resources needed to litigate these cases is draining the budgets of state attorneys' general offices and tax departments.

States do have responsibility to insure that all property is valued in a fair and equitable manner. With respect to railroads and other centrally assessed property, states have continually sought improvements in the equity and uniformity of their valuation methods. For example, the Western States Association of Tax Administrators has, in a major undertaking extending over several years, drafted a new manual recommending uniform methods for valuing this property. The manual has the potential for being used nationally. The Multistate Tax Commission will consider in the next two weeks joining with the western states organization in endorsing and sponsoring this manual and thereby encouraging a larger number of states to use it. Beyond this effort, the Multistate Tax Commission is considering additional activities to promote uniform valuation practices among the various states.

A variety of other organizations are also involved on a continuing basis in improving the training of state appraisers for railroad and other centrally assessed property. The training available to state personnel in what is a highly technical area certainly exceeds any comparable resource available to the federal court system to which valuation authority has now migrated.

The effect of the Burlington Northern decision is to wrest from states the ability to assure uniformity and fairness within the state property tax system. Federal district courts are becoming the annual review board on state assessments of railroads, and will be able to independently determine the value of railroad property. This is unfair to all other classes of taxpayers which must go through state administrative hearing and judicial procedures.

Furthermore, the railroads have the right of preliminary injunction and can avoid paying the disputed portion of their property tax until the conclusion of litigation. *All other taxpayers must pay their taxes first* and then seek a refund. The injunctive relief provision is creating budgetary havoc for local jurisdictions.

For example, in Washington state, Burlington Northern Railroad is contesting its valuation for three tax years. Over $6.3 million have been enjoined from *32 of the 39 counties in the state*. Of that amount, approximately 30 percent goes to education and 70 percent to local taxing districts. In Wisconsin, $2 million were enjoined in a railroad case that ultimately cost the state and counties $28 million in lost revenue

because the decision was extended to public utilities. In a recent California valuation and assessment case, four railroads, the Atchison, Topeka, & Santa Fe Railway Company, Burlington Northern, Union Pacific, and Southern Pacific were granted injunctive relief of over $11 million.

FEDERAL COURTS HAVE EXPANDED THE 4-R ACT PROVISION TO ALLOW RAILROAD ATTACKS ON ALL STATE AND LOCAL TAXES AND FEES

The property tax provision of the 4-R Act contains a section that federal courts have interpreted extremely broadly to restrict the states' taxing policies in all forms of taxation, not just property taxes. The railroads are pursuing litigation that challenge taxes ranging from personal property tax exemptions to income taxes to regulatory fees. Two of the panelists here today will describe this problem in greater detail. Nebraska recently lost a federal court case involving Trailer Train, a carline company that resulted in the legislature appropriating funds to help the counties recoup their losses. In Oregon a case is on appeal which, if the state loses, will virtually *close down their rail safety program*. I don't believe the authors of the property tax provision envisioned the law to be used so broadly that state legislatures would have to bail out counties and that safety programs would be jeopardized.

CORRECTIVE LEGISLATION IS NEEDED TO ASSURE THAT THE 4-R ACT PROTECTS AGAINST DISCRIMINATION RATHER THAN INCREASING IT

In recognition of the states' constitutional right of self government, the federal government has allowed the states broad autonomy in setting state tax policy. Granting special interests the ability to bypass state review processes and go directly into federal district court is contrary to the traditional division of authority within our federal system.

These policy issues are translated into very real budgetary problems because of the injunctive relief provision. It is not uncommon as mentioned above, for millions of dollars to be enjoined. Local governments and school districts depend on these tax revenues and court challenges are creating fiscal nightmares for local jurisdictions. The injunctive relief provision has proved to be an effective weapon in their litigation strategy because it ties up badly needed local revenues. Thus, to maintain fiscal stability in their communities, the states and localities are under tremendous pressure to cave into the railroads.

In some states, railroad property valuations have actually fallen. Furthermore, the states find themselves in the position of being called upon to make up the budget shortfall for the counties and school districts. And this situation is escalating at a time when federal revenues to the states are dropping and many state coffers are strapped. The federal policy of reduction in aid to the states sends a message to the states to take charge of their fiscal matters. However, expanding 4-R property tax breaks runs contrary to that message by limiting a state's power to make sound tax policy.

The property tax provision of the 4-R Act granted to railroads privileges not available to other classes of taxpayers. The real victims of these actions are the school children whose school districts are forced to reduce services while cases are pending, and other property taxpayers—homeowners, farmers, retailers, and manufacturers—who lack the privileges of the railroads and have to make up the shortfall. In the mid-1970s, when the 4-R Act was passed, supporters justified this action because it provided some tax relief to the financially troubled rail carrier industry. Nevertheless, granting the railroad industry federal court jurisdiction and injunctive relief was an unprecedented and regrettable move. Granting similar tax breaks to other narrow interests compounds the discrimination, it does not provide equal protection.

The MTC and FTA are interested in working with the Surface Transportation Subcommittee to develop solutions to remedy the property tax provision of the 4-R Act.

Thank you for the opportunity to present our views here today.

QUESTIONS OF SENATOR EXON AND THE ANSWERS THERETO

QUESTION #1

The representative of the interstate natural gas pipeline industry stated in his testimony that his industry is the victim of two types of discriminatory state taxation. One type of discrimination he cited is by States that either assess or tax pipelines at higher rates than other commercial and industrial property. The second type of discrimination is by States who evaluate assessments for pipeline property more frequently than other property. Do you believe these are discriminatory actions, and, if so, do you believe that Federal legislation is warranted to alleviate this type of discrimination against pipeline or other transportation industries?

ANSWER

The Multistate Tax Commission disputes the claims by the Interstate Natural Gas Association of America (INGAA) that 11 states have discriminatory property tax practices on interstate gas pipelines. We surveyed those 11 states and found that INGAA misunderstood or misrepresented the tax laws of a wide variety of states. Furthermore, the pipelines, like all other taxpayers, can challenge their tax assessments through a state appeal process. In those 11 states, challenges by the interstate gas pipeline companies in recent years have ranged from minimal to nonexistent. The bottom line is that the pipeline industry has demonstrated neither discrimination nor a lack of adequate state remedies for whatever complaints they have.

What has been overlooked by the pipelines is the key point that each state has a unique tax system encompassing the whole gamut of taxes from property to income to sales and use taxes. Property taxes are merely a piece of that tax pie. Each state's tax system is structured in such a way as to fulfill the overall social and economic policy goals of that state. For instance, a state may offer homestead exemptions to elderly or disabled homeowners because they are not as able to provide for themselves as are other homeowners. In some states, interstate businesses enjoy special sales and use tax exemptions. As Senator John Breaux pointed out at the Subcommittee hearing on September 16th, in Louisiana, the interstate natural gas pipelines are valued at a lower level than intrastate gas pipelines, but pay at a higher tax rate to equalize their tax burden. As a result, federal intervention that impacts one industry in a state can disrupt the entire tax structure and destroy the integrity of the state tax system. Isolated differences in the rates, assessment practices or exemptions for individual taxes do not constitute discrimination between entire industries.

In regards to the frequency of assessments, property is

valued as needed to ensure fairness and equity. Some property needs to be valued more frequently than other types of property. The key factor is to appraise property on a schedule that is reasonable for that type of property and that is administratively feasible.

QUESTION #2

As you know, existing statutory authority for railroads, motor carriers, and airlines provides that these modes cannot be taxed differently than other commercial and industrial property. Do you feel that it is appropriate to compare transportation property with "other commercial and industrial property"?

ANSWER

As discussed above, isolated aspects of particular taxes on transportation property and commercial/industrial property is not appropriate because it does not tell the whole story of a state's fiscal system. In some states, the railroads for example, have industry specific tax benefits and industry specific service enhancements. For instance, in approximately 17 states, safety fees are used to provide safe railroad crossings and other services that contribute to a sound railroad system. On the other hand, sometimes transportation industries pay a higher level but for good reason. In some states for example, in order to maintain a quality road system, truckers pay industry specific taxes which may be more than others who use the roads. This policy is supported by the trucking industry. Consequently, it is not easy to make comparisons about one specific tax on two very distinct industries. Again, isolated differences do not constitute discrimination.

QUESTION #3

It seems that many of the complaints against the railroad statute are based on the fourth element of the statute which disallows "another tax that discriminates against a rail carrier providing this transportation". Is this the portion of the statute that is the greatest source of concern for you?

ANSWER

The problem with the restrictive tax provision of the 4-R Act is the disruption it manifests. It is not possible to separate and rank the concerns created by the restrictive tax provisions of the 4-R Act because the provision in its entirety has created unpredictable and significant disruption in state and local tax policies. To some extent, we can identify 3 specific areas of concerns, each of which is responsible for major problems. The three areas of concern are: 1) the "other tax" section; 2) the valuation issue; and 3) the federal court and injunctive relief privileges. While the "other tax" provision has recently become the focal point of concern, the valuation issue is a time bomb waiting to explode. Access to the federal courts gives the railroads the status of privileged citizens

because it creates two systems of tax administration and over time will create significant tax inequity. When that happens, homeowners, farmers, ranchers, and small businesses are the victims of discrimination. It is not appropriate to compare the valuation issue versus the other tax issue because it is the result that is so devastating to local governments and school districts. It is like asking which method of amputating a leg is worse, a saw, a knife, or an axe?

QUESTION #4

Would it also be accurate to say from your testimony that of the three transportation modes which currently enjoy Federal statutory authority in this area, the rail statute has proven to be the most troublesome for States and localities?

ANSWER

The railroad statute has definitely been the most troublesome for two reasons. First, the railroads were granted the most generous tax breaks in the property tax provision of the 4-R Act. Although the law was intended to prohibit discrimination of state taxation in rates and assessments, it actually does much more by allowing the railroads direct access to federal courts, granting injunctive relief, and giving the federal courts the power to review all forms of taxation. The truckers do not have the catch all provision that covers other taxes. The airlines do not have the catch all provision nor the federal court jurisdiction and injunctive relief privileges.

Secondly, the railroads have invested considerable resources into litigating 4-R cases throughout the country, more so than the truckers or airlines. Their litigation strategy has effectively broadened the interpretation of the property tax provision to give the federal courts the power to determine valuations and to overturn any tax or fee that the railroads would prefer not to pay. Valuation challenges provide endless opportunities for the railroads to litigate in federal court and along with the challenges, the states and localities endure the onslaught of multimillion dollar injunctions and lengthy and expensive trials.

QUESTION #5

From the testimony, it would appear that the problems that States have experienced from the anti-discrimination provision in the 4-R Act have grown rapidly in recent years. To what do you attribute this rapid growth in litigation?

ANSWER

Until recently, a good share of the litigation by the railroads has been to define the law, not to challenge state tax practices. Two factors have contributed to the rapid growth in litigation in recent years. First, the U.S. Supreme Court decision in Burlington Northern v. Oklahoma Tax Commission has

opened the door to the federal courts to review railroad valuations. The railroads exploited the lack of clarity in the law and successfully broadened its interpretation through a series of court victories. The U.S. Supreme Court's decision stated the legislative history is irrelevant which means the only avenue open to the states is pursuing legislative remedies.

Second, the 8th Circuit decision in the Nebraska Trailer Train case has created an increase in similar cases from Florida to California. This decision broadened the catch all provision to entitle the railroads to receive tax breaks for taxes and exemptions they are not normally eligible for in the tax system. This is new territory for the railroads for they now can challenge any type of exemption, tax, and fee.

Senator EXON. Thank you, Ms. Heitkamp.

Before we go to John Boehm—by the way, Senator Packwood, since you do have to leave—we will follow the usual procedures of questioning after the panel is completed, but in view of your time constraints, if you have any questions of any kind, we will be glad to accommodate you.

Senator Breaux, a valuable member of the Commerce Committee, has just arrived. Do you have any opening statement or comment, Senator Breaux?

Senator BREAUX. Glad to be here.

Senator EXON. Thank you, Senator.

John Boehm, we are delighted to have you here this morning. We have discussed this issue on many occasions. Thank you for coming in to testify.

STATEMENT OF JOHN BOEHM, NEBRASKA STATE TAX COMMISSIONER

Mr. BOEHM. I appreciate the opportunity, Senator. My name is John Boehm, and I am the Tax Commissioner for the State of Nebraska.

The State of Nebraska has serious concerns about the unintended effects of, in particular, section 306(1)(d) of the 4-R Act. We also share those concerns of the Multistate Tax Commission and the Commissioner from North Dakota.

The 4-R Act was originally intended to address equalization of railroad property with other commercial and industrial property and the prohibition of discriminatory tax rates by many states. We have no argument with that fundamental purpose of the 4-R Act. Nebraska's constitution has always granted equal, uniform treatment for all taxpayers in Nebraska, including the railroads.

Now, however, because of the expansion of the act into unintended areas by the railroads and the Federal courts, Nebraska finds itself in the position of a victim. More specifically, the local governments, the cities, the counties, the villages, the school districts and the other taxpayers of the State of Nebraska, including other commercial and industrial taxpayers find themselves in a very disadvantageous position.

The 4-R Act was never intended to interfere with legitimate state tax policies, including exemptions, nor was it intended to grant preferential tax treatment for the railroads. Yet, that is exactly what has happened in Nebraska as a result of the application

of this so-called catch-all provision, 306(1)(d), at it has been applied by the railroads and the Federal courts. It is ironic that this provision, known as the anti-discrimination provision, has actually created tax discrimination within the State of Nebraska.

In Nebraska, the Federal court granted exemptions from the property tax for all railroad and car line personal property. Yet, all other businesses, thousands of businesses, in Nebraska pay personal property tax on their business personal property from large conglomerates like Con Agra, Beatrice Foods, telephone companies like Northwestern Bell, AT&T, the pipelines, the businesses on Main Street, Nebraska, the banks the insurance companies, the private practitioners. All pay personal property tax on their business equipment, but not the railroads, not the car lines as a direct result of this Federal legislation. They are now privileged taxpayers in Nebraska.

Yes, Nebraska does exempt certain classes of personal property, agricultural machinery, livestock, grain, seed, feed and business inventory. These exemptions were never enacted in response to the 4-R Act. In fact, they were set in place well prior to its adoption. They have been upheld on a constitutional basis by our state supreme court. They don't discriminate against the railroads or any other taxpayers on their face. They are neutral.

The avowed purpose of the 4-R Act was equal treatment with other commercial and industrial property taxpayers. This is not now the case in Nebraska. The car line companies, for example, that receive the benefits of local police and fire protection services now pay no taxes at all in the State of Nebraska. They have a free ride through our state.

As a result of the unintended applications of the 4-R Act, local governments in Nebraska last year suffered a shortfall of $13 million. This is a lot of money, and in some cases subdivisions, school districts, this amounted to more than 10 percent of their budget. The state was, in turn, forced to aid the local subdivisions with a partial reimbursement of these losses from our general fund sources.

In the future this burden will shift to the other taxpayers of the State of Nebraska, homeowners, farmland, and most importantly to the other commercial and industrial property taxpayers who continue to pay personal property tax on their business equipment.

We are concerned about fairness in taxation in Nebraska, and that is why we are here today. We are concerned with equal treatment for the railroads and with other commercial and industrial taxpayers, not preferential treatment, however. And that is the result of the application of section 306(1)(d) which needs to be reexamined to prohibit these unintended privileges granted to the railroads and the car line companies.

[The statement and questions and answers follow:]

STATEMENT OF JOHN M. BOEHM, NEBRASKA STATE TAX COMMISSIONER

The stated purpose of the Railroad Revitalization and Regulatory Reform Act (4-R Act) was to assist in the restoration of financial and operational stability of an ailing and financially plagued railway system. Congress concluded that railroad companies were overtaxed by many states relative to other commercial and industrial properties and that such discriminatory practices were detrimental to the stated objectives of restoring financial stability. It is abundantly clear from the leg-

islative history of section 306 of the 4-R Act, the extensive debate surrounding its eventual passage, and from the language of its principal operative provisions that the original focus and concern prompting the passage of this section of the Act was the equalization of railroad property with other commercial and industrial property for purposes of state and local property taxation.

This focus on equalization is obvious in the language chosen for subsections (1)(a), (b), and (c) of section 306, which prohibit:

"(a) The assessment * * * for purposes of a property tax * * * of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property; (b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a); (c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction."

This last provision, subdivision (1)(c), was in particular aimed at those states which by statute or constitution assessed railroad property at a higher level than other types of property.

The state of Nebraska does not take exception to the intended purpose of the 4-R Act, that being equalization of railroad property with other property subject to ad valorem taxation. Indeed, Nebraska's constitution guarantees uniform treatment to all taxpayers, including railroads, and the Nebraska Supreme Court has and continues to enforce these provisions. In fact, some of the earlier case law involved railroads seeking equalization with other taxpayers, and in which relief was granted by the Supreme Court. For example, in *Chicago, Rock Island & Pennsylvania Ry. Co.* vs. *State,* 197 N.W. 114 (Supreme Court of Nebraska, Dec. 31, 1923) the court found as follows:

"From a careful consideration of all the facts in evidence, we are of the opinion that the valuation of the property of complainant lacks reasonable uniformity with the assessment of lands and improvements; that, as the record recites, the railroad property has been assessed at "full actual value," and that the other class mentioned has been assessed at a much lower percentage. This being the case, the property of complaint should be revalued as nearly as possible at the same percentage of actual value as all other property."

Nebraska was not one of the states singled out for criticism by the railroads in their attempts to pass this legislation, and its intended purpose was really unnecessary as to Nebraska. Likewise, Nebraska's present concern with the 4-R Act does not involve its original stated purpose or intent, but instead the subsequent application and expansion of the scope of the Act by federal court decisions as a result of the railroads' aggressive and coordinated strategy of litigation across the country.

In particular, much of the deviation from the original intent and focus of this legislation has resulted from the application of subsection (1)(d) of section 306 which prohibits "the imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part." This provision was not greatly debated during the passage of this Act and there are likewise no standards for its application contained in the legislation itself.

This subdivision's apparent intent was to prevent retaliatory legislation by states with discriminatory equalization and assessment schemes which were otherwise corrected by the substantive provisions of section 306 of the 4-R Act. Now, however, it is being used and expanded by the railroads through the federal courts to challenge a whole host of unintended state tax programs and situations, including property tax exemptions (Nebraska, Washington, Florida, California, Iowa, and North Dakota), railroad safety assessment fees (Oregon), carrier income tax (West Virginia), and others. It is safe to say that given the current direction of the courts and the railroads in expanding this provision that no state tax programs, including income taxes and sales and use taxes, are safe from attack under this statute. It is, thus, subsection (1)(d) that is the primary focus of the concern of the state of Nebraska, although Nebraska also shares the concerns of other states as to the expansion of the overall scope of the Act to include actual valuation of the railroads, as opposed to equalization, as well as the harsh results that can stem from the use of the injunctive relief provisions.

APPLICATION OF THE 4-R ACT IN NEBRASKA

As indicated, Nebraska's constitution has always afforded equal treatment to the railroads, and to all taxpayers, in terms of the uniform and proportionate assess-

ment and levy of taxes. When the provisions of the 4-R Act became operative in 1979, the state was not hesitant to apply the equalization criteria spelled out in the Act, and the state began applying the statewide commercial and industrial sales assessment ratio to railroad property. In fact, after considering the equalization and uniformity requirements of the Nebraska Constitution, the state determined that it would apply this ratio not only to railroads, but to all centrally assessed property, including telephone companies, pipelines and other utilities.

There was one case in 1983 in the federal district court of Nebraska in which the railroads challenged the state's application of the 4-R Act (*Burlington Northern Railroad Company, et al.* vs. *State Board of Equalization and Assessment, et al.* United States District Court for the District of Nebraska, CV83-L-691, December 8, 1983). This involved a dispute as to which sales/assessment ratio, or measure of central tendency, to use for equalization purposes under the Act. The state advocated the use of a mean sales/assessment ratio, because this was the ratio that had been used for purposes of intercounty equalization by the State Board of Equalization and Assessment. The railroads, on the other hand, advocated the use of a median sales/assessment ratio. Neither the legislative history of the Act, nor then existing court decisions, were of great help in determining which was the proper measure of central tendency to use for purposes of the 4-R Act. The federal district court, however, after reviewing the testimony from both parties, and in particular the sales/assessment ratio guidelines and standards published by the International Association of Assessing Officials (IAAO), indicated that the appropriate measure of central tendency should be the weighted mean or aggregate sales/assessment ratio. Both the state and railroads agreed to accept the federal court's reasoning and the state continues to apply this ratio for purposes of equalization of railroad property and compliance with the 4-R Act.

This current year, the state went one step further, and in consideration of the state's constitutional requirement of uniformity of assessment for all classes of property, determined that all centrally assessed property, including railroads, should be equalized to the level of value of all assessed property within the state, provided this did not conflict with the terms of the 4-R Act. As a consequence, railroad property was equalized at a level of value that was less, albeit only slightly so in this case, than the sales/assessment ratio for commercial and industrial property as required under the 4-R Act.

It should, thus, be apparent that the railroads have always been and continue to be protected by the constitutional safeguards of Nebraska's Constitution, and that the original intended relief sought by the railroads in the passage of the 4-R Act was really unnecessary as to the state of Nebraska.

THE TRAILER TRAIN LITIGATION

In 1987, Trailer Train, and other car line companies, which are, in turn, wholly owned by the various railroad companies, filed suit in the federal district court of Nebraska under section 306(1)(d) of the 4-R Act (*Trailer Train Company, Railbox Company, and Railgon Company* vs. *Donald S. Leuenberger, Tax Commissioner,* United States District Court for the District of Nebraska, CV87-L-29, January 9, 1987). Their claim was based on the contention that the majority of personal property is Nebraska is exempt, (more specifically that 75.75 percent of all commercial and industrial personal property, as defined in the Act, is exempt), and that their personal property should likewise be exempt for the 1986 tax year. The complaining companies were not railroads but car line companies, which own railroad cars furnished to the operating railroads, and as such they owned no real property in Nebraska, all of their property in the state being railroad cars which are personal property.

A brief explanation of Nebraska's personal property tax exemptions are perhaps in order. Nebraska's Constitution specifically allows the legislature to classify and exempt certain classes of personal property from taxation. As a consequence, in addition to household goods and various property owned by religious, charitable, and educational institutions and organizations, the legislature has exempted the following classes of property from personal property taxation: business inventory, livestock, feed and fertilizer, grain, and agricultural machinery and equipment. In addition to boats, airplanes, and other miscellaneous items of personal property, the principal category of personal property which remains subject to taxation is that which is commonly referred to as business equipment or, in other words, personal property and equipment owned by businesses and used in the production of income. This exemption scheme is neutral on its face, and does not differentiate between the owners of such property in that any owner of such business equipment or property

is liable for tax on the property. This is true regardless of whether the property is manufacturing equipment owned by manufacturing industries, computers owned by service industries, or typewriters, desks, and office furniture owned by the smallest businesses. Of course, the same result has been applied to all state centrally assessed properties including telephone companies, pipelines, railroads, and car lines.

The Nebraska Supreme Court upheld the constitutionality of these legislative classifications in the case of *Stahmer* vs. *State* 192 Neb. 63, 218 N.W.2d 893 (1974). The Court applied traditional and widely recognized constitutional tests of reasonableness that have been used and upheld in tax classification and exemption cases for a variety of tax situations. The Court's analysis is particularly appropriate here:

"In any event, we do not find the classifications set forth in the Act to be unreasonable. Ability to bear the burden of the tax is everywhere recognized as a reasonable ground on which to base a classification in tax measures. Classification for tax purposes may be based on the manner of conducting business, and business conducted in one manner may be taxed differently from business conducted in another manner. The purpose for which property is kept or used has long been recognized, if not a favorite, basis for distinction in taxation. The view has also been taken that reasonable discrimination with respect to tax matters to promote fair, competitive conditions, equalize economic advantages, or encourage particular industries from consideration of public policy is lawful. 51 *Am. Jur.*, Taxation, section 182, page 242. This court has held that: 'It is competent for the legislature to classify for purposes of legislation, if the classification rests on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.' *Shear* vs. *County Board of Commissioners*, 187, Neb. 849, 195 N.W.2nd 151.

"The legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences in situations and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated." *Rehkopf* vs. *Board of Equalization*, 180 Neb. 90 141 N.W.2d 462.

"The exemptions granted pertain to property used in agricultural production, the products thereof, and business inventories. They are granted to all persons engaged in the lines of endeavor mentioned. There can well be public policy reasons for the grant of these exemptions. It is generally recognized that persons engaged in agricultural pursuits and in businesses with large inventories are, in proportion to ability to pay, heavily taxes. A legislative desire to equalize the tax burden with, for example, individuals with major investments in untaxed intangible personal property is not unreasonable."

Of course, in Nebraska, agriculture is the primary industry of the state, and recognizing the difficulties beset by farmers and others engaged in the business of agriculture, the state legislature determined that it was necessary and in the public interest to grant these exemptions. Public policy is often promoted by means of exemptions in a variety of tax situations both at the federal and state level. Here it was presumed that these exemptions would aid the ailing agricultural industry within the state of Nebraska which in turn drives the remainder of the economy of the state. Unfortunately, and ironically, as will be demonstrated, this legitimate public policy determination by the state of Nebraska is being undermined by the unintended results of the 4-R Act which itself was passed for the avowed public policy of revitalizing the ailing railroad industry on a national level. A policy result that now appears to have been very successively accomplished it might be added. In any event, the federal district court in the *Trailer Train* litigation determined that because a large portion of all personal property in Nebraska is exempt from taxation, this was discriminatory as to the complaining car line companies and all of their personal property should thus be exempt from taxation. (Judgment Entered, December 11, 1987) In applying section 306(1)(d) of the 4-R Act, it is apparent that the federal courts, both in this case and in other cases relied on by the federal judge in Nebraska, are not applying traditional constitutional tests of discrimination, or reasonable classification tests as set out above, that would normally be applied in any other circumstance. Instead, they are using a literal test of discrimination in that if there is any difference in treatment whatsoever, be it real or perceived, then the railroad companies, or as in this case the car line companies, are entitled to relief under the Act.

As a consequence, the car line companies, owning only personal property, have literally a free ride through the state of Nebraska, despite the fact that they enjoy the benefits of the fire, emergency and other police protections and services provid-

ed by the local subdivisions of the state of Nebraska. Consider also the hazardous materials that many of their cars may well be carrying. Moreover, the car line companies now stand in a privileged position as to other businesses in the state of Nebraska which own business equipment otherwise subject to taxation under Nebraska's laws and constitution. Certainly, it was never the intent of Congress to place railroads or car line companies in privileged positions as to other taxpayers, but that is the bottom line which has resulted from this unintended application of section 306(1)(d) of the 4-R Act. It is particularly disturbing that in any other situation using traditional constitutional tests of discrimination and reasonableness these results would never have been achieved.

THE AFTERMATH OF THE TRAILER TRAIN DECISION

The immediate impact of the *Trailer Train* decision on the political subdivisions of the state of Nebraska, which are the recipients of all property taxes levied in Nebraska, was the loss of $1 million that had already been budgeted to be collected for the 1987 tax year from the car line companies. More importantly, the railroads operating in Nebraska, the Burlington, Northern, Union Pacific, and Chicago Northwestern, filed a similar suit alleging that 40 to 50 percent of their total system property was personal property and, thus, they were entitled to the same relief as the car line companies under section 306(1)(d) of the 4-R Act. (*Burlington Northern Railroad Company; Union Pacific Railroad Company; and Chicago Northwestern Transportation Company,* vs. *Donald S. Leuenberger, State Tax Commissioner,* United States District Court for the District of Nebraska, CV87-L-565, November 9, 1987.) The court, of course, granted them preliminary injunctive relief, and the local subdivisions of the state of Nebraska were immediately faced with a $9.2 million dollar shortfall from taxes which had already been levied and upon which budgets had been set. This injunctive relief is one of the harsher aspects of the 4-R Act, not available to protesting taxpayers under state law.

The state legislature in turn made a one-time partial reimbursement to the counties in the amount of $7.7 million for the 1987 tax year to mitigate the harmful impact of the pending budget shortfalls and the disruption of essential local services provided by the counties, municipalities, school districts, and other governmental subdivisions. While these dollar amounts may not seem large from a federal government perspective, the impact on local governmental subdivision budgets can be severe. For example, School District 14 in Sioux County lost 26 percent of anticipated property tax revenue; the Alliance School District in Box Butte County lost 19.76 percent of anticipated tax revenue; Grant County lost 10.72 percent of anticipated property tax revenue; Thomas County lost 14.38 percent of anticipated property tax revenue; the city of Alliance lost 4.99 percent of anticipated property tax revenue; and the city of Duncan lost 12.33 percent of anticipated property tax revenue.

Subsequently, a class action lawsuit was filed on behalf of all car line companies operating in Nebraska for the 1987 tax year again seeking the same relief, exemption of all of their personal property from taxation. (*Oklahoma Gas & Electric Company, et al.,* vs. *Donald S. Leuenberger, State Tax Commissioner,* United States District Court for the District of Nebraska, CV88-L-52, January 25, 1988.) In addition, several car line companies have filed refund claims going back as many as eight years claiming entitlement to refunds under state refund statutes, in turn based upon the *Trailer Train* decision, even though the relief granted by the 4-R Act is prospective only. To date, a total of 43 companies have filed claims seeking $1.8 million in refunds. These claims have been denied and some companies have appealed to state court.

Legislation was passed in the Nebraska Unicameral in 1988 (LB 1165) which permits the railroads to avoid seeking federal injunctive relief as long as an existing lawsuit and injunction from a prior tax year is on file in the federal district court. This in effect grants them a state injunction for their personal property taxes for the current year. The railroads were thus not required to file any 4-R litigation for 1988. Because of a concern over the constitutionality of this legislation, the state requested the railroads to go ahead and file a 1988 4-R lawsuit prior to local budget setting in order to avoid a repeat of the shortfall situation in the event LB 1165 was successfully challenged. The railroads refused. A temporary restraining order has now been entered in a suit challenging the law, many budgets have now been set, and the unsettled situation will no doubt persist during the ensuing year. While many of the local subdivisions may have avoided budgeting shortfalls as a result of their prior implementation of this legislation, the tax burden will nevertheless immediately shift to other property tax taxpayers in the state to make up for what

are, in effect, federal court exemptions of railroad and car line personal property in the state of Nebraska.

In addition, in 1988 two major pipeline companies (Northern Natural Gas Company and Trailblazer Pipeline Company) and their subsidiaries sought the exemption of all of their personal property under the state constitutional uniformity provisions by claiming that they are entitled to the same treatment available to the railroads as a result of the 4–R Act. A telephone company has also filed a similar suit in state district court. The relief requested by the pipeline companies was denied by the State Board of Equalization and at least one of these claims is presently pending before the Nebraska Supreme Court. The total tax loss from those pipeline companies would be $4.5 million for the 1988 tax year. It is likely that other centrally assessed properties will make similar claims at the state level next year, and that a variety of businesses and industries owning personal property now subject to taxation will begin making these challenges at the local level. Should any of these claimants be successful on a state constitutional basis, the state will experience the gradual erosion of its tax base and a fundamental interference with the state's tax policy as a direct result of this misapplication of the 4–R Act. If all such property were found to be exempt as a result of the domino-like effect of such challenges, the state would lose $6.5 billion worth of value or approximately $161.5 million in local tax revenues.

The state is appealing the *Trailer Train* decision to the 8th Circuit Court of Appeals, although the 8th Circuit decisions from Iowa and North Dakota clearly weigh heavily against the state's position. A California federal district court decision in a similar exemption claim has adopted a favorable position, however, (*Trailer Train* vs. *State Board of Equalization,* 538 F.Supp. 809 N.D. Cal. 1982.) The state is also vigorously litigating the 1987 lawsuits filed by the railroads in federal court.

CONCLUSION

In summation, we have a real problem in Nebraska as a direct result of unintended expansions and applications of section 306 of the 4–R Act. Because of the broad applications that federal courts are giving to subsection (1)(d) of section 306, in turn largely due to the lack of any standards set forth in the law or any substantial legislative history or intent behind this provision, substantial harm and mischief is being wrought in regard to state tax policy. The issues under the 4–R Act are no longer simply the intended ones of equalization of railroad property with other property. The federal courts have now gone far beyond this original intent of the law, in many cases because of the application of subsection (1)(d). This broadening of the focus of the relief provided under the Act has permitted an abuse of this law by the railroads. The railroads are no longer an ailing industry, (See Appendix A) but are financially sound, and through a coordinated strategy of litigation are now taking advantage of the states and wreaking havoc with otherwise legitimate state tax policy. As a result of this particular aspect of the 4–R Act, we now find substantial intrusion by federal courts into what has heretofor been recognized as an area of noninterference in state tax policy. This, in turn, has caused chaos in local budgeting and finance, distruption of essential governmental services, and unequal and privileged treatment of railroads and car line companies in comparison with other taxpayers. This preferential treatment for the railroads and car lines was never the intended purpose of the original legislation. In addition, now other categories of taxpayers, most notably the pipeline companies, are seeking identical relief in the form of similar legislation at the federal level and are also attempting to piggyback the railroads' success through state court applications.

The state of Nebraska certainly has no argument with the equalization provisions and the intent of section 306 of the 4–R Act to provide equalization and uniformity of taxation for ralroad property with other property. It is only the deviation from this intended purpose and the challenge of legitimate state tax policy decisions which prompts the state of Nebraska to request that this legislation be examined with a view toward correcting the excesses presently being allowed under the federal court systems through the 4–R Act, most notably through subsection (1)(d) of section 306. This subsection in particular needs either to be repealed, or substantially amended to avoid the types of decisions that are now being rendered by the federal courts, and the subsequent unintended interference in areas of legitimate state tax concerns.

Union Pacific Railroad increased its earnings 14 percent to a record $440 million before special items—despite modest growth in revenues to $3.9 billion. The Railroad's second consecutive major earnings gain resulted from ongoing cost reduc-

tions, higher volume, and the most dramatic program of productivity improvements and consolidation in many year.—Union Pacific Corporation, 1987 Annual Report.

Burlington Northern Railroad achieved record traffic volumes in 1987 and contributed 57 percent of BNI's consolidated operating income. All major commodity groups showed gains, with the agricultural, food and forest products groups each recording increases of greater than 15 percent over 1986 revenue-ton-miles. The Railroad's continuing efforts to reduce costs resulted in better profit margins in 1987. The attendants productivity gains have enabled the company to compete effectively with other carriers by providing improved service and savings to our shippers.—Burlington Nothern, Inc., 1987 Annual Report, Form 10–D.

QUESTIONS OF SENATOR EXON AND THE ANSWERS

QUESTION:

1. The representative of the interstate natural gas pipeline industry stated in his testimony that his industry is the victim of two types of discriminatory state taxation. One type of discrimination he cited is by states that either assess or tax pipelines at higher rates than other commercial and industrial property. The second type of discrimination is by states who evaluate assessments for pipeline property more frequently than other property. Do you believe these are discriminatory actions and, if so, do you believe that Federal legislation is warranted to alleviate this type of discrimination against pipelines or other transportation industries?

ANSWER:

I believe that either scenario presented by the representative of the interstate natural gas pipeline industry could be considered a discriminatory practice by a state. I also believe that these practices, if they exist today, could be addressed and corrected by the state courts. I do not feel that federal legislation is needed to alleviate this type of practice in the limited number of states in which it may be occurring. In Nebraska, for example, our constitution prohibits these types of discrimination as it requires uniform and proportionate valuation and tax treatment for all taxpayers.

QUESTION:

2. As you know, existing statutory authority for railroads, motor carriers and airlines provides that these modes cannot be taxed differently than other commercial and industrial property. Do you feel that it is appropriate to compare transportation property with "other commercial and industrial property"?

ANSWER:

Yes, I feel as a general rule it is appropriate to tax all commercial and industrial property owners similarly for property tax purposes. However, differences within a particular industry may necessitate a different valuation method or tax treatment which is not discrimination from a constitutional standpoint. Moreover, should the definition of "commercial and industrial" property include such items as livestock, grain, and agricultural personal property, as it presently does under the 4-R Act? And perhaps more importantly, should it include exempt property? I believe the answer to these last two questions should be "no"!

QUESTION:

3. It seems that many of the complaints against the railroad statute are based on the fourth element of the statute which disallows "another tax that discriminates against a rail carrier providing this transportation". Is this the portion of the statute that is the greatest source of concern for you?

ANSWER:

The fourth element of the 4-R Act, section 306(1)(d) is most definitely the greatest source of concern for Nebraska. The reason is obvious. We attempt to uniformly value all property in the state, equalize that value with all other property within that class, and levy and collect the taxes in a consistent manner. Yet, Nebraska is still being accused of discriminating against selected taxpayers because they do not own the particular types of property our state tax policy has chosen to exempt. Most disturbing is the fact that these same taxpayers want to be exempt from taxes on the same types of property which is taxable to all other taxpayers.

QUESTION:

4. Would it also be accurate to say from your testimony that of the three transportation modes which currently enjoy Federal statutory authority in this area, the rail statute has proven to be the most troublesome for states and localities?

ANSWER:

Of the three transportation modes enjoying federal statutory authority, I believe the 4-R Act is the most troublesome law for the states and localities. This is due to the fact that this particular legislation provides significant advantages and preferential treatment to the railroads, not enjoyed by any other taxpayers under other federal or state law. This was the substance of the testimony presented by representatives of the pipeline motor carrier and airline industries on September 16, 1988, before the Surface Transportation Subcommittee.

Senator EXON. John, thank you very much. And we will have questions after a few moments.

Ms. Ryles, we are pleased to recognize you now for your statement.

STATEMENT OF NANCY RYLES, OREGON PUBLIC UTILITY COMMISSION, ON BEHALF OF THE NATIONAL ASSOCIATION OF REGULATORY COMMISSIONERS

Ms. RYLES. Well, thank you and good morning. I am Public Utility Commissioner Nancy Ryles from the State of Oregon. I am also appearing here representing the National Association of Regulatory Utility Commissioners, and we thank you for this opportunity to testify before your committee and to bring to your attention a matter which we think is of critical importance to the State of Oregon and important to at least 17 other states as well.

Certainly Oregon is affected by what we think is the misapplication of some of the very important property tax provisions in the 4-R Act that the former speakers have referred to. And I have a letter here from our Department of Revenue, Richard Munn, who Senator Packwood knows very well, stating our position regarding the property tax question.

But my appearance on the panel today is to bring to your attention an additional matter.

Senator EXON. Let me accept that for the record without objection.

Ms. RYLES. Thank you very much.

But my purpose in being here today is to bring another matter to your attention that is an additional problem to the 4-R Act, and we hope for your serious consideration of this particular point.

It seems that Oregon's ability to continue conducting its rail safety programs in the State of Oregon is seriously threatened by a lawsuit that was filed in July 1986 by the Union Pacific Railroad alleging that the Oregon Public Utility Commission's assessment fee for railroad safety programs is discriminatory taxation under the 4-R Act, section 306(1)(d) that you have heard about earlier.

I am also sorry to report to you that in July 1987 Judge Panner of the U.S. District Court agreed with the railroad's position and

said that it was impermissible discrimination under the 4-R Act, section 306. We have, of course, appealed that decision. It is now in the Court of Appeals.

What I would like to tell you about is if the railroad's position prevails in this suit challenging the assessment of regulatory fees for regulatory costs, the railroads will be the only regulated industry in the State of Oregon that does not pay its regulatory costs. In Oregon all regulated industries pay the cost of their regulation: the motor carrier industry, the investor-owned utilities, the electric, the gas utilities and, of course, all of the telephone companies.

So, we believe if the railroad prevails in their case, the effect will be very widespread. In fact, in my testimony on page 8 is a graphic illustration of the 17 states that use an assessment form in collecting their regulatory fees. They will be gravely affected.

We also know that in the State of Washington that Burlington Northern plans to file a suit in Washington if the Oregon case is not overturned by the Court of Appeals.

What I would like to say is that Oregon clearly supports the work that was done on the 4-R Act, certainly by Senator Packwood, that establishes a principle of fairness. We don't think, as I don't think anyone else does that is responsible, that railroads should be singled out or any other industry for unjustly discriminatory taxation in the area of property tax or in any other area.

But what we see by the filing of this case is really a challenge and it is really a challenge to States' rights. It is a challenge to prohibit the states from assessing regulatory fees to cover regulatory costs. And I would like to remind you that those regulatory costs in most of the states are all for rail safety programs.

Frankly, when I looked at the case, I looked at it and said here is a very responsible section of law dealing with property tax discrimination and dealing with uniformity. No one can certainly take any exception to that. But we feel that they have taken that responsible section of law and taken a particular section and essentially applied it to the collection of regulatory fees.

We think that is a misuse. I would say it is a misapplication and perhaps I would use as strong a word as an "exploitation" of some responsible legislation to address a real problem and is now being misused in the regulatory area. In fact, by setting the railroads up in the State of Oregon as the only industry without paying regulatory fees for its regulatory costs, I think it actually creates reverse discrimination.

We have researched the work that was done so extensively by Senator Packwood and others on the creation of the 4-R Act. We have substantiated testimony from a former Senate committee staff member, Thomas Allison from the State of Washington, who confirms in his letter that no one really contemplated in the extensive hearings that were held on the bill and the gargantuan work that was done to create a real problem then at that time, in 1976, of discrimination among the states, that there was no mention of the application or any discussion whatsoever of regulatory fees on the hearings on the bill.

I think it is also interesting to note in substantiating that position that this piece of legislation was not to address regulatory fees or the use thereof, that the railroads have not challenged anything

under this statute that was passed in 1976 until 10 years later in 1986 which I think again lends support to the fact that that was not the intention of the 4-R Act when it was passed in 1976 by Congress.

Of course, we are very hopeful that Judge Panner's decision—and the specifics of that decision and the questions that are litigated are attached to my testimony. We are very hopeful that that will be overturned. But even if we are successful in that area, I would like to testify before this committee and bring to your attention I think very much the need for a legislative remedy.

The fact is all of you with all of your experience know that whenever you have a series of court cases that are decided and that those would be decided in the 17 states that use a similar method, that there is a very strong possibility of getting a variety of decisions based on a variety of different issues that are particular to the situations in those 17 states which results in case law even adding more ambiguity and really more confusion to the interpretation of that section of the law. And that is why we feel a legislative remedy would be the cleanest, the clearest and the best way to go about correcting this misuse of property tax discrimination laws in relationship to regulatory fees.

So, it is precisely for that reason that the National Association of Regulatory Utility Commissioners in their annual meeting in San Diego in July of this year adopted a resolution encouraging Congress to make an amendment to the law—and the specifics are written out in my testimony—that simply says nothing in the 4-R Act prohibits any state from collecting a fee to cover the regulatory costs of that industry's regulation.

This will certainly not solve all our problems. All of you are very aware that there should be discussion from regulated industries about saying we think the fees are too high. Perhaps we don't like the method of fee that you use. Perhaps we don't think the Oregon Public Utility Commission does a very good job administering those fees. All those very legitimate topics of discussion should certainly take place. But they should take place in the arena of state legislatures. When the Oregon Public Utility Commission's budget is up before the Ways and Means Committee, if they don't think we are doing a job, that is the place where those arguments should take place. If they feel the fee assessment is too high—and that's established by state statute—then that should be argued in the halls of state capitals where state legislatures can make that decision.

I just would conclude my remarks by saying that we feel it is very important to urge you to clarify that section of the law in relationship to regulatory fees so state regulators can do the job that we are appointed to do, and that is to protect the public interest regarding rail safety in cooperation with the Federal Government, with the state government and, of course, with the railroads themselves.

I thank you very much for your time.

[The statement follows:]

STATEMENT OF NANCY RYLES, COMMISSIONER, OREGON PUBLIC UTILITY COMMISSION

Good morning. I am Nancy Ryles, an Oregon Public Utility Commissioner. I am grateful for the opportunity to testify today on a matter which we believe is critical to the State of Oregon.

Oregon, like many other states, is affected by the discriminatory taxation provisions of the 4R Act because of its property tax implications. However, we have an additional problem. Our ability to regulate the safety of railroads and railroad crossings is threatened by a suit filed in July 1986, by Union Pacific Railroad, alleging that the fee PUC assesses on railroads is unjustly discriminatory under the 4R Act. We believe the railroads are attempting to stand the antidiscrimination protection of the 4R Act on its head. In Oregon, if the railroad position prevails, railroads will be the only industry which will not have to pay for the costs of its regulation.

We also believe that if the railroad prevails the effect of the suit will be widespread. Based on a survey we conducted a year ago, we believe that as many as seventeen states are vulnerable to a similar suit. The state of Washington, in fact has been notified by the Burlington Northern Railroad that it will be sued if Oregon loses its appeal. Included in the testimony is a graphic showing those states that have rail programs funded in a manner similar to Oregon. (Appendix A) The Oregon Public Utility Commission is the state agency with responsibility to regulate electric and natural gas utilities, telecommunication companies, motor carriers and railroads. Our rail program is primarily what I am here to discuss today.

The future of PUC's rail program is in serious jeopardy because of the Union Pacific lawsuit. The suit was filed under Section 306 of the 4R Act of 1976, (49 U.S.C. 11503[b][4]). It is interesting to note that no railroad challenged a state regulatory fee under that law until ten years after its enactment. Oregon strongly supported the principle—and still does—that railroads should not be singled out for unjustly discriminatory treatment in taxation or in any other area. No one believed when the 4R Act was passed that its anti-discriminatory tax provisions were intended to place the railroads in a more favorable position than any other industry. Nevertheless, this is exactly how the railroads are attempting to convince the courts to interpret the act, and with some success.

Last July, United States District Court Judge Owen Panner, found in favor of the railroads and enjoined Oregon from collecting its rail regulatory fee. Oregon is appealing his decision and continues to collect its fee with the understanding that if the appeal is lost the fee is refundable to the railroads. Our potential liability, if the case is decided by the end of this year, is approximately $2.2 million.

Oregon has an excellent, nationally recognized rail program. Our emphasis is on safety: at grade crossings and in railroad operations, including safety concerns related to operating employees, track structure, locomotives and rolling stock and hazardous materials. We also actively participate in rail abandonment proceedings, as well as other rail-related proceedings before the Interestate Commerce Commission.

Our programs have substantially benefited both the public and the railroads. Our crossing safety program, for instance, staffed by six persons, has been outstanding. Grade crossing accidents have been reduced from a high of 313 in 1968 to 46 in 1986. Fatalities have remained below ten annually—usualy much lower—since 1978. This is a result of an aggressive effort to either close or install automatic protective devices at all dangerous crossings. State and federal funds pay for installing new warning devices at existing crossings; the rail fee supports the administration of the program.

For many years, PUC has participated in the enforcement of federal track safety and equipment safety standards under the federal-state partnership created by the 1970 Railroad Safety Act. Federal Rail Administration has reimbursed the states for a portion of their costs of participating in this program under the reasonable premise that this relieves the federal government of a portion of its enforcement responsibility. We have two track inspectors and two equipment inspectors, who in addition to enhancing FRA's inspection ability, educate new short line operators in safe railroad operations. In 1988, FRA will reimburse us 15 percent of the cost of this program. No federal funds are appropriated for 1989.

Finally, we have three positions responsible for insuring that railroads and rail-served industries comply with Oregon rail employee safety regulations. Since this program was put into place in 1974 there has been a dramatic decrease in railroad employee accidents.

If our appeal to the Ninth Circuit is not successful, we will more than likely be forced to discontinue most, if not all, of our rail activities. This would be a tragic result of legislation which we believe was not intended to affect fees used to cover the cost of state rail programs.

Our legislative research, which has been substantiated by a former Senate committee staff attorney, Thomas Allison, confirms that Congress never contemplated rail regulatory fees when it passed the 4R Act. In Oregon, all regulated industries pay the cost of their own regulation. In fact, Oregon PUC receives no general fund revenues. Public utilities pay a fee to support their regulation. Motor carriers bear the full cost of their economic and safety regulation.

If Judge Palmer's decision stands, railroads would in effect, be granted a privilege which no other industry in Oregon enjoys. This is a judicial expansion of the law that was never intended by Congress and it is grossly unfair to other regulated industries.

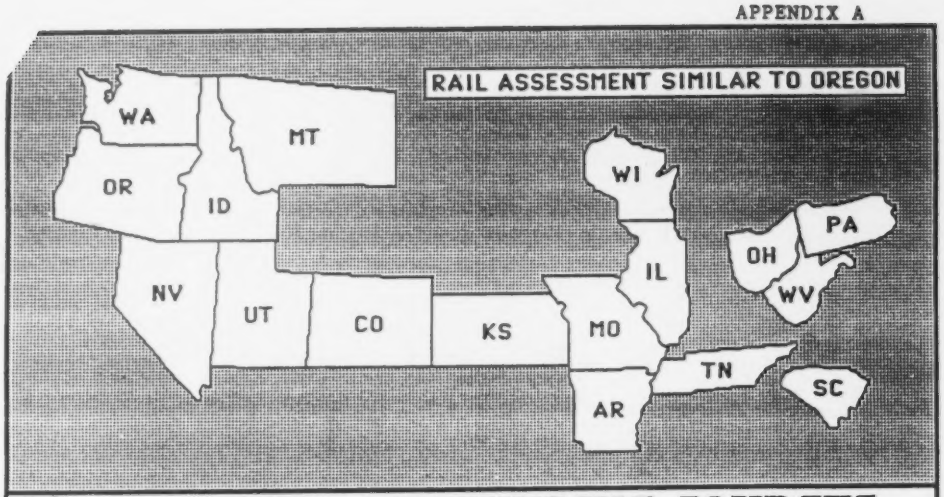
A legislative remedy is necessary. Without it, more cases will be filed in other states. Section 11503(a)(4) fails to establish a class, for comparison purposes, to use in establishing that discrimination against railroads exists. It leaves that function entirely to the judge, and thus far no judge has defined the same class. In Oregon's case it would appear that requiring each regulated industry to bear the cost of its regulation is not enough to prevent a charge of unfair discrimination. The judge may find that even if one industry is charged a lower fee, or assessed at a lesser rate than railroads, railroads are being treated unfairly. That flies in the face of common sense. The level of costs which each industry imposes upon the public obviously are not equal.

This July, the National Association of Regulatory Utility Commissioners adopted a resolution (which is attached to my testimony) which proposes one solution to this problem: Amend the law to clearly state that nothing in the 4R Act prohibits any state from collecting a fee to cover its cost of regulating railroads. It is not the only solution, given the complexity and far reaching effects of this section of law, but it would protect states' ability to continue meaningful state rail programs.

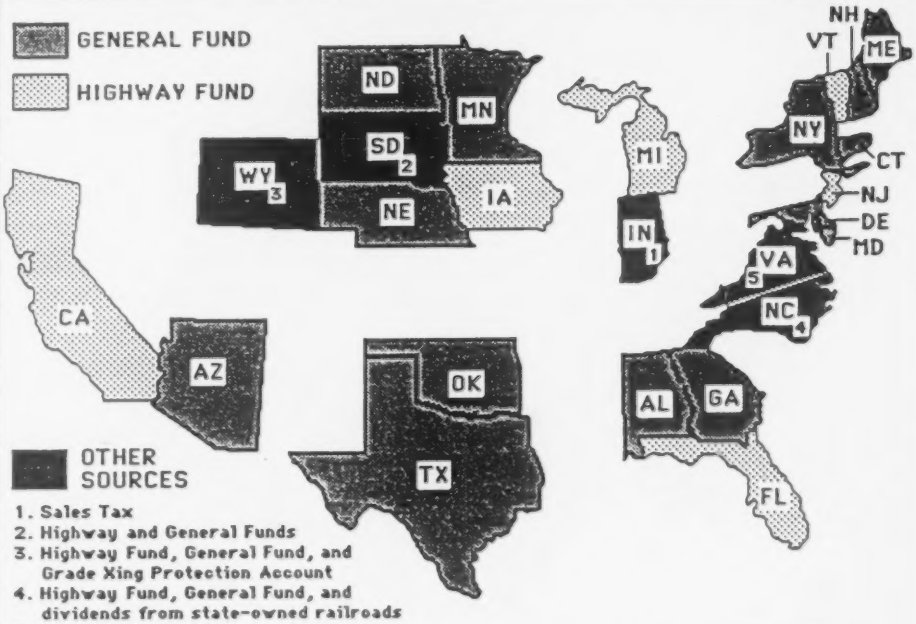
Since the filing of the suit, we have continued to research various finding options and have concluded that *any* fee or tax on railroads would be vulnerable to suit. Our only option would be to seek funding from general tax revenues, which is not fair to all other regulated industries, which without exception pay the cost of their regulation, and in many cases contribute additional revenues to the General Fund. This is true of the banking industry, the insurance industry, and the timber industry, as well as motor carriers, telephone companies, electric and natural gas utilities. Oregon has consistently supported the railroads' efforts the reduce costs and become more efficient. We have consistently supported the intent of the Staggers Act and have not supported efforts to re-regulate the rail industry. However, we do not believe that railroads, for whatever reason, deserve special treatment. If the decision in *Union Pacific* v. *Oregon PUB* stands, the result will be just that—special treatment of railroads.

Again, I thank your for the opportunity to bring this issue before today. I have included in our written testimony copies of the decision in the case, the NARUC resolution with attachments, and legislative history obtained from Thomas Allison. I am also available to answer any questions you may have. Thank you.

APPENDIX A



RAIL PROGRAM FUNDING SOURCES



1. Sales Tax
2. Highway and General Funds
3. Highway Fund, General Fund, and Grade Xing Protection Account
4. Highway Fund, General Fund, and dividends from state-owned railroads
5. Valuation Funds

Senator EXON. Thank you, Ms. Ryles.

Mr. Berg, we welcome you and we are glad that you are here this morning.

STATEMENT OF GEORGE L. BERG, JR., ASSISTANT DIRECTOR, NATIONAL AFFAIRS DIVISION, AMERICAN FARM BUREAU FEDERATION

Mr. BERG. Thank you very much, Mr. Chairman. My name is George Berg and I am representing the American Farm Bureau Federation.

The Farm Bureau is the largest general farm organization in the United States representing more than 3.6 million member families. Our members include producers of virtually all commercially produced agricultural commodities.

We appreciate the opportunity to appear before you today in opposition to H.R. 2953, a bill which will prohibit the alleged discriminatory state taxation of natural gas pipeline companies.

At the annual meeting of the Farm Bureau last January, the voting delegates of the member state Farm Bureaus approved the following policy: "The Federal government should stop making policy on the assessment and taxation of transportation property or any other property. This is a state and local matter and should remain at that level. We urge repeal of that portion of the so-called 4-R Act pertaining to the assessment and taxation of rail properties."

Our delegates adopted this policy because they believe many states are losing their taxing authority over major property owners to the Federal courts. A 1987 Supreme Court decision and recent Federal legislative efforts will further limit the states' ability to fairly tax property, diminish the states' power to assure uniformity and fairness within the state tax system, and create budgetary havoc for local governments and school districts.

This problem originated with the passage of the Railroad Revitalization and Regulatory Reform Act of 1976. The property tax provision of the 4-R Act was intended to prohibit alleged discrimination of state taxation in rates and assessments of railroad property. In fact, it does much more. It grants the railroads the privilege of bypassing state administrative and court reviews and going directly into Federal court. It allows the railroads to be granted injunctive relief while their cases are pending. Further, it gives the Federal courts review over all types of state taxation, not just property taxation. These are special privileges unavailable to the average business and individual property owner.

Since 1979 when the 4-R Act went into effect, two other developments have exacerbated the states' problem. Similar privileges were granted to the motor carriers in 1980 and the bus industry and the airline industry in 1982.

The enactment of H.R. 2953 or any similar bill would limit the power of state legislatures to classify property for different treatment as to taxation even though such differences result from the endeavors of state legislatures to accomplish social and economic objectives determined by the people to be desirable. In many cases such differences in tax treatment of classes of property have been

91-521 0 - 89 - 2

incorporated in state constitutions. Some examples of these different state tax rates include:

1. Investment in new plants and industry may be taxed at a preferential rate to provide employment and develop industry or commerce within the state.

2. Exemption, or low tax rates, may be provided for a percentage of a veteran's investment in personal housing.

3. Exemption, or low tax rates, may be granted on housing occupied by retired, disabled or blind persons.

4. An exemption from taxation or a lower level of taxation may be provided on property used to reduce soil, water or air pollution.

5. State property tax rates on trucks, which are used on a part-time basis, are commonly considerably lower than for other trucks or property.

6. Reduced levels of property taxation have been provided in some states for transit companies as apparently the only feasible alternative to public ownership of such facilities.

7. Taxation of forest property is often on a severance basis, or an exemption or rebate basis, or some other basis designed to promote or preserve a forest products industry in the state.

Tax rates on land may be set at low rates to accomplish a desirable public purpose such as an open space preservation, watershed, recreational or agricultural use and other uses determined by the state to be in the public interest.

The enactment of H.R. 2953 would effectively preclude the innovative use by states of tax differentials to accomplish purposes determined by the people of the states to be desirable.

Therefore, Farm Bureau supports the exclusive authority of the states to determine the taxation of property located within their boundaries, and we opposed H.R. 2953 for the reasons we have stated above.

Again, Mr. Chairman, I appreciate the opportunity to appear.

Senator EXON. Mr. Berg, thank you very much.

Let me begin the questioning and we will hold the questioning for five minutes each per round to try to save some time and get to the heart of the matter.

I may advise this panel and the other panels that are going to follow that we may submit some questions to each of you individually from individual Senators that we would like to have you answer for the record as promptly as you can so it can be made part of the official record because as has been indicated by Senator Kasten and others, this is an important meeting that has far-reaching effects.

And I think all of us are trying to be fair and I echo the statements that you all have made here this morning. And especially, as an old States righter myself, I would hope that we could keep the Federal Government out of the regulation of matters that are much better left to the states.

Now, having said that, we should also recognize that interstate commerce is something that has to be regulated by the Federal Government and not state governments and therein lies the dilemma that we find ourselves in now.

Speaking of dilemmas, John Boehm, I would like to start out by asking you a question. I have been trying to knock heads together

with all of the parties involved in all of these disputes that are raising their ugly heads. I had hoped that this hearing would not have been necessary. We have other things coming down the pipe. In fact, we have a markup coming up next Tuesday in the Commerce Committee on the CURE bill which some allege will be getting back into the area that Senator Packwood spoke about at the beginning of the hearing with regard to re-regulation of the railroad.

So, these are all matters that I had hoped could have been solved by people of understanding and goodwill working together, working out their compromises because I for one think we pass too much legislation, some of it good, some of it bad, all designed as perfect legislation when it passes the Congress and is signed into law by the President. But oftentimes it doesn't turn out that way.

It does appear to me we are going to need some fine-tuning in many of these areas.

So, in my contacts and in my talks to people in the industry, I don't think I have given one in the last several years that I haven't said if you don't get together and solve your problems, then we are going to solve them for you in Washington. That might be good, and it might be bad.

I know that there has been a series of meetings going on, as I understand it, between particularly the railroads and you as state tax commissioner in Nebraska with regard and in an attempt to work out some kind of a settlement on this issue. And I intend to ask the railroad representatives later on when they testify as to whether or not they have been successful. I would like for you at this time to give us your view of what has and what has not happened with regard to the negotiations or at least an attempt to negotiate between the State of Nebraska and the railroads.

Mr. BOEHM. Senator, we have met with the railroads on more than one occasion and I think in good faith looked at their settlement proposals.

One of the problems that the state faces in this case is that it is not the recipient of any of these tax monies that are at issue. These tax monies go to the local governmental subdivisions, the school boards, the cities, the counties, what have you. They are not parties to the lawsuit. The state happens to be the party since it is the collector. We, in turn, distribute that money.

So, we met with those affected individuals, the ones that are directly impacted. Their general overwhelming response was we don't think that you should settle this lawsuit. We took those considerations into our analysis of the railroad's proposal.

I think the other thing that in good faith entered into our final decision that we weren't in a position to settle the suit was the fact that Nebraska's constitution requires uniform treatment with all taxpayers in the State of Nebraska. Other commercial and industrial taxpayers in Nebraska would not be getting these benefits that the railroads have achieved through Federal litigation. And we simply could not sign off. As the state is responsible for upholding the constitution and the uniform treatment of all taxpayers, we could not voluntarily sign off and agree to accept that privileged treatment for the railroads when the other taxpayers weren't afforded the same treatment.

Senator EXON. Mr. Boehm, were the subdivisions of state government involved in this matter because, as you point out, the State of Nebraska in the instances we are talking about was merely the collecting agent and the money went to the counties and the school districts, the subdivisions of state government? Were they involved in any of these discussions in an attempt to come to some kind of an understanding? Or because of the reasons that you just cited, you didn't bring them in?

Mr. BOEHM. They did not meet with the railroads themselves. We met with them, state and county local subdivisions, to discuss the general settlement proposal so that we might have their input since they are the ones that were directly affected by any settlement decision that we might enter into. So, we met with them on that basis. They did not meet directly with the railroads.

Senator EXON. Thank you, Mr. Boehm. My time is up on the first round.

Senator Kasten, you would be next.

Senator KASTEN. Mr. Chairman, thank you.

I don't understand what you just said. First of all, let me say I have an open mind on this issue, and I don't understand this issue particularly well, but I hope that I will understand it better.

You just said that you were concerned about a position in which the railroads weren't being treated the same way as everyone else. Wasn't the basis of the case that was decided that railroads were being taxed at 100 percent and other businesses were being taxed at something less than 100 percent on whatever that property tax base is, their commercial and industrial property? It seems to me that the court wouldn't have found what they found if, in fact, the railroads were receiving special treatment. It sounds as if the railroads were receiving full tax treatment and the commercial properties were receiving, if you will, special treatment. Could you correct me if I am wrong?

Mr. BOEHM. Well, I guess I don't agree with that particular analysis of the results, Senator, because the other personal property taxpayers in Nebraska, the other commercial and industrial taxpayers, the businesses right down the street from the railroad's headquarters in Nebraska, pay personal property taxes on their chairs, their desks, their computers, their business personal property. The railroads don't as a result of this Federal court decision. And to me that is not uniform and fair treatment. It is discriminatory, in this case discriminatory in favor of the railroads.

The Federal court in reaching its decision looked at this broad subsection 306(1)(d), which just says there shall be no other discrimination, and using a standard which the best analysis I can make is if there is any different treatment for railroads with any other taxpayers in the state, then that is discrimination. Of course, that is not discrimination on a constitutional or common law basis as we have come to know it in any other tax program if you look at reasonable classifications, but the courts have adopted a literal test, if there is any difference whatsoever in treatment.

In Nebraska the situation was, yes, we have personal property tax exemptions for some classes of property, mostly agricultural property. That amounted to approximately 75 percent of the total

personal property in Nebraska. But that is not on a taxpayer basis, that is on classes of property.

Senator KASTEN. You disagree with the accounting system that the court had, but you do agree with the percentage, 75 or 76.

Mr. BOEHM. We can't dispute that. That's a fact.

Senator KASTEN. Let me switch the subject. Were any of you part of this debate that took place evidently with the National Conference of State Legislatures personally? My notes say that there was a debate that took place on this subject with the National Conference on State Legislatures. They considered taking a policy position against Federal legislation limiting discriminatory taxation of natural gas pipelines and in favor of protection of the 4-R Act against railroad property taxes, et cetera.

It would seem to me that all state legislators should have had an unanimous position—it looks like unanimous on this panel at least—based on the desire to change this law. Nevertheless, my notes say that this failed among state legislatures. And I guess even though it is not your position, could you just tell me why is it that this was not a vote that passed? It required a two-thirds vote and a two-thirds vote was not achieved. What were the other people opposed to and why would they, as representatives of state legislatures, take that position?

Ms. HEITKAMP. Senator Kasten, I have to admit to not being at the meeting. I think it was in Las Vegas at the time. But the Multistate Tax Commission, probably under my signature, sent to all the participants of that convention information concerning the property tax problem. I think it was a problem on the front end of not having enough lead time to discuss the issue with the various legislators and with the various committees that were being represented.

But I do want to say that the National Council of State Legislatures has a rule that it requires three-fourths, I believe, to pass a resolution it by unanimous consent, and they came very close.

Senator KASTEN. My notes say two-thirds, but it is a super majority.

Ms. HEITKAMP. Right, but I think the way it turned out was that there were 34 votes for it and 4 against, or 30 votes for it and 4 against. So, there were four people persuaded by arguments that were made at that point in time by the railroads.

Senator KASTEN. Do you know what their point of view was? It would seem to me that representing a state, you would automatically be for States rights and you would be trying to keep us out of your business. I used to be in the state legislature.

Ms. HEITKAMP. I think the point of view that was taken was that the issue came on them so quickly that it needed more study. They have appointed a special committee to take a look at it. There was just too much (as you have recognized here) on the plate in terms of the issues, and the legislators did not feel comfortable with the knowledge that they had for making a decision. But I don't want to unfairly characterize anyone's vote.

Senator KASTEN. Mr. Chairman, I thank you.

Senator EXON. Senator Breaux.

Senator BREAUX. No questions of this panel.

Senator EXON. We have been joined by our colleague from South Dakota, Senator Pressler. Senator Pressler, I will recognize you at this time for any opening statements that you might have and then if you would proceed with any questions that you have of the panel.

Senator PRESSLER. Thank you, Mr. Chairman. I shall put my statement in the record. I apologize for being late. I have three committees going at the same time.

Senator EXON. Without objection, that is so ordered.

Senator PRESSLER. I do also have a statement by my colleague, Senator Karnes, and I ask unanimous consent to insert it in record at this time.

Senator EXON. I am also pleased to accept for the record the statement by Senator Karnes.

Would you, Ms. Heitkamp, please expand for me a little bit further on the questions put by Senator Kasten. Let me ask the question this way.

I started out the hearing this morning by citing the problems and the experience in Nebraska, and they are very complicated ones. I know of other states that have been similarly situated and where there have been court actions that work around all of the edges of this very complicated situation.

As spokesman for the Multistate Tax Commission, is it not true that many states have not been hit with this problem yet, but are likely to be in the future?

Ms. HEITKAMP. Mr. Chairman, I believe that is correct. As state tax administrators, what happens more frequently than not, we administer the centrally assessed property tax system. So, utilities and anyone on a unity type of value system comes before a state board of equalization.

What happens with the legislators is, basically, they work on general fund revenues or special fund revenues as they related to highways and motor fuels. And those local revenue sources are not really addressed until someone in the local area sees a problem.

So, we have a communication problem between the local, city and county governments and the state entities that administer this. And we have to, as John said, be very aware of their concerns and start addressing those.

As these problems start multiplying, I think the first wave of litigation on the 4-Rs address a lot of those concerns that this body and this Congress had as they related to property tax discrimination. Now we are getting into the areas of utility fees, into the areas of calculating a percentage of property tax based on what is exempt.

And what we are seeing more and more is a more favored nation type treatment of utilities. And I think this is coming on the local authorities. It is coming on the school districts, on these people unaware because they aren't seeing the arguments on the front line. They aren't the responsible parties.

So we, as an organization in communication with local entities, need to be talking now about what the potential revenue impacts are of receiving that most favored nation treatment. I think that is a characterization that I would give to it because it is an analogy to your trade policies when you have one entity that receives an

exemption and the other one doesn't. If you have a more favored nation policy, then the entity with that receives the exemption.

I will give you an example. Pipelines. If the pipeline is successful in getting any other discrimination provision, what could potentially happen in North Dakota is rural pipelines could be subject to tax. Now, our legislature has determined that rural water lines, because they deliver safe drinking water to the rural areas and because they are basically not-for-profit organizations, co-ops, they are going to be exempt. Now, if that "any other discrimination" provision passes, does that mean that the legislature has two choices, one to exempt the interstate carriers, the other to tax the rural water lines because they are a separate treatment?

And I think there are a number of issues like that—pardon the pun—in the pipe that could very well come before the legislature and come before the states to make those determinations. And I think they don't understand that there are a lot of issues still unresolved that we need oversight on and need to discuss.

Senator EXON. Senator?

Senator KASTEN. Heidi, can I just follow up on what you said? Just take that one step further.

You know, we had a case a year or so ago where the governor of Florida tried to impose a tax on advertising outside of the state because it was the political way to do it. My guess is that your local water people that you described are local people. And therefore it is harder for the legislature to impose a tax on them, whereas your interstate pipeline people and some of your truck people and some of your railroad people are headquartered somewhere other than where the legislature is going to be. So, it is easier to vote taxes on the people that aren't there.

That is probably why we have the situation we have on agricultural land in Nebraska. Part of this is out of your hands. I mean, it is in the hands of your state legislatures it seems to me.

And the other side of that—I want you to respond to me—the politics of it is that it is easier to vote to tax someone who is somewhere else if you can get away with it than it is to vote to tax your farmers or your local co-op who are in the business of delivering water. And so, you will make agreements and you will use words like you did. They deliver clean water and that is different than delivering energy or whatever, and we could argue about that. But the fact is that this is a political question.

Ms. HEITKAMP. Senator Kasten, I am not going to deny that you can trace history and that the party that is right there in the legislature and represents a group of people who actually vote for those legislators in the elections gets representation. And maybe in some instances that representation is better than what an outside entity, which is a captive entity in that state, will receive.

I did in my opening remarks make two comments to the effect that we have seen a trend of state legislators and state administrators being very concerned about their business perception, the perception of them by companies like pipeline companies and railroads, because there is now a fair amount of competition for economic development. People want their state to have an appealing business climate, and they don't want to be known as a state that

discriminates unconstitutionally or otherwise against out of state entities because they are trying to encourage development.

One example I gave is in North Dakota. When we could have continued to tax airline property, personal property of the airlines, our legislature voted not to do that.

The other point that I made was with worldwide unitary. When the argument was presented to the legislators, even though multinationals don't really vote in the state elections, their concerns were recognized and the states moved off the worldwide unitary method and went to water's edge in response to their concerns and in response to concerns of the Congress.

So, our argument on the front end is that those problems should first be demonstrated in the state legislature. If there is a problem then, a problem that interferes with interstate commerce, a problem that the Congress needs to address, it should be after remedies are exhausted in either the state courts or in the state legislature.

Senator KASTEN. You are in a sense agreeing with at least part of what I said that this issue is in this overall basket of efforts to try to shift taxes to somewhere other than where they impact directly. We are doing a little bit of it with the direct mail business in Wisconsin. You have had a little bit of experience in the banking business in your state. Everyone is trying to work on this, and I think that is why this issue is going to be difficult for us to deal with on a Federal basis.

Ms. HEITKAMP. Senator Kasten, really the question is: "Is everyone paying their fair share?" And there are different perceptions on what is the fair share.

Senator KASTEN. Thank you. Thank you, Mr. Chairman, for yielding to me.

Senator EXON. I'm very happy to do that.

This has been a very informative panel, and we are going to move along. I just have one last question.

Mr. Berg, you addressed a House bill that has primarily to do with gas lines, as I understand it. Let me see if I can explore further the Farm Bureau's stand on some of the railroad matters that are before us.

I am sure the 4-R Act was supported or at least has been well received in most instances because the 4-R Act has had a part to play in reestablishing the financial soundness to a considerable degree of the railroad industry that was in sad, sad shape indeed. And with that and the Staggers Act, we have been successful in seeing a significant reduction in most instances of the cost of moving the product of the farmers.

And so, I guess would it be safe to say that the Farm Bureau is not for re-regulation, but you feel that States rights issues and possibly some fine-tuning of the legislation in a whole series of areas may be at least in order to consider. Is that a fair conclusion?

Mr. BERG. Yes, Senator, I believe that is a safe statement to say. We did support the Staggers Rail Act in 1980. We are not in favor of re-regulating the railroads in any way, shape or form. We see some areas for fine-tuning. We have that in our policy. We sometimes feel a little better implementation of the act by the ICC might be better than legislation. But we are opposed to re-regulating the railroad industry. By and large, our agricultural products,

at least for grain, are being moved quicker, they are being moved better, they are being moved cheaper, 30 percent cheaper than in 1980. So, we strongly support the Staggers Act.

Senator EXON. My last question would be to you, Ms. Ryles. We have been working very closely with the regulatory agencies of the states in a whole series of areas, and this hearing this morning is such a broad range that I just want to assure you that most of us here see most of this as a States' right issue. However, as I said earlier—and I saw you nodding your head—interstate commerce has to be regulated at the Federal level.

In your discussions with your counterparts across the country, do you feel that they are as alerted and concerned to this problem and the problem that you addressed this morning as some of us in the individual states that have been adversely affected by these recent decisions? In other words, is the concern of the regulatory agencies up to speed on this matter in the states as a whole?

Ms. RYLES. Senator, yes, I think it is beginning, it is evolving. The record vote at the annual meeting in San Diego, which was attended by people from all over the United States, there were no objections. And in the discussion in the NARUC transportation committee, the question of regulatory fees—there was no opposition to protecting the state's right to assess those regulatory fees. So, I think there is a growing concern.

Since Oregon is the first case, it then takes a while for that to get out because some people replied, well, I don't think we have a problem. And when we pointed out Judge Panner's decision where they used the classification argument that that is where the real problem is that I think gets to Senator Kasten's comments is that what do you measure discrimination against. Judge Panner's decision said the regulatory fees are discriminatory because other industries and other business concerns do not pay a regulatory fee. And therefore it is discriminatory. Of course, our response to that is, yes, but other businesses and industries—we don't regulate them. So, why would we charge them a regulatory fee?

And what really happens here, because there isn't a classification discussion or a clarification in the 4-R Act, it leaves open the question of what you measure discrimination against. And that is where I think you find the real problem. It's where you find the real problem that has been so well articulated by Nebraska. It is not measuring like against like; it is measuring unlikes. And that is where you get into some really strange situations.

Probably in the income tax law, an analogy would be, well, a capital gains tax is a discriminatory tax because not everyone pays a capital gains tax. Well, that's true. Some of us don't make any investments that when we sell them, they make more money. So, we don't owe a capital gains tax. But when you start measuring discrimination as anything in the tax field as being different, then you completely rule out—the real important classification in any type of taxation is to make sure likes for likes are fairly charged, but not that we think everybody is in the exact same situation and every tax policy as to apply to everyone else or you get strange kinds of constructions of tax law.

Senator EXON. Let me thank you for that statement. And before I recognize Senator Breaux, I just would say——

Senator BREAUX. I have no questions.

Senator EXON. Then let me wind down this particular panel. What I am concerned about here is that unless the Congress possibly defines or retunes some of these things, we are going to find ourselves in a position where the courts or one judge eventually is going to be deciding what transportation policies should be.

Certainly those involved in the telephone industry know full well that the whole telephone communications industry basically has come down to one judge who is a czar. And while that judge has to take into consideration I guess what was intended by the Congress, what it comes down to basically is a matter of putting these issues in the hands of the judiciary, where I think it should not be, not interpretation of the laws, but the making the laws, the making of the regulations, if you will, the supervision of a very fundamental industry, such as the telecommunications industry.

That is a concern, and that is why when some people say, well, we mustn't do anything because that's re-regulation. That's a bugaboo word. I don't know anybody in Congress who is for re-regulation of any parts of the transportation industry. But every time we talk about some fine-tuning or maybe taking some action, that charge is raised.

So, I just thank the panel for your excellent testimony. Mr. Berg, Mr. Boehm, Ms. Heitkamp, Ms. Ryles, thanks for being here and you are excused.

The next panel includes the transportation industry witnesses. We thank all of you for coming this morning. We have worked with many of you over the years on major transportation issues. And we have always found you forthcoming, sometimes agreeable, sometimes not, but I congratulate all of you and the good job I think you do in representing your particular industry's position.

And so, Mr. Richard Briggs, Executive Vice President of the Association of American Railroads; Mr. Tom Donohue, President of the American Trucking Association; Mr. James Landry, General Counsel for the Air Transport Association; Mr. Jerry Verkler, the Senior Vice President for Government Affairs, Interstate Natural Gas Association; and Mr. Joseph Farrell, President of the American Waterways Operators. We will follow the usual procedures, and unless there is one of the witnesses who would like to go first, I will call on Mr. Briggs to start off the testimony. Welcome to you, Mr. Briggs.

STATEMENT OF RICHARD E. BRIGGS, EXECUTIVE VICE PRESIDENT, ASSOCIATION OF AMERICAN RAILROADS

Mr. BRIGGS. Thank you, Mr. Chairman. And I want to thank you for the chance to present the railroad industry's views on the benefits from section 306 to the railroads and to the thousands of shippers that use rail service.

Since you have indicated that our written testimony will be included in the record, let me briefly summarize the key points in this discussion as we see them.

Section 306 was the result of nearly two decades of congressional study and debate. That debate ranged primarily over the areas of what the remedies should be rather than over the nature of the

problem which was generally considered to be widespread with respect to the railroads. Not every state was engaged in a pattern of discriminatory taxation, but a substantial number of them were. And the Congress estimated that during the 1960s, the railroad industry incurred over $900 million in losses because of discriminatory taxation.

Railroads were hit probably harder than any other industry. Part of that was the sheer question of size. Part of it, as Senator Kasten pointed out, results from doing less well when you happen to be a foreign entity than a local entity. Part of it related to the fact that the railroads, unlike other modes, have to own their own rights-of-way and maintain them. The net result is that in a relative sense we have to have more assets than other modes of transportation and, therefore, are subject to more property taxes.

And finally, we can't move unlike a lot of corporations who may find that the taxing policies of a particular jurisdiction are becoming adverse. It is difficult to carry on commerce in the state without facilities in that state.

The 1976 action that finally resulted was strongly supported by most common carriers, by shippers that use rail, truck service, water service, bus service by the Federal Government's agencies, the ICC, Department of Transportation, by labor unions and the American Bar Association. And I suspect after the hearing today, you will find that most of those groups are in the same place, as well as the groups that objected to it then, namely, the state taxing powers.

Since the provisions became effective in 1979, it has been an extremely—extremely—important piece of legislation. It has, with no significant exceptions, been doing what it was designed to do. The Oregon case that you talked about earlier is an unusual situation that depends on a factual reading of whether or not the fees were reasonable fees or whether they were taxes. Obviously, the court in its initial opinion had a different view on the reasonableness of those charges and the benefits the railroads received than does the Oregon Public Utility Commission.

But setting that issue aside, basically section 306 is doing what it was designed to do. It did it because of the full panoply of provisions that were there. If we had not had, for example, the provision in section 306 that precluded any other form of discriminatory taxation, it is very probable that we would be in a worse position today in terms of unfair taxation than we were in 1976.

In my testimony I have laid out a number of new tax initiatives that have been tried in various states to add additional taxes to the railroads that have been blunted basically because of this provision after the states were stopped from the more frequent and common forms of property tax discrimination. We have seen states attempt to have gross receipts taxes on railroads or a small group of industries. We have watched taxes levied in the form of excise fees on broad groups, but obviously designed to be a rifle shot such as the excise tax that only applied to anyone who used diesel fuel to propel a train. We have seen taxes levied on car miles. We have seen, rather than changes in assessed value or different rates, exempting large groups of assets or groups of taxpayers but retaining taxation of railroads.

In the drive to secure additional revenues, there has been no end literally that to the number of new discriminatory taxes that have been proposed. And without that provision, we simply would have been back where we were in 1976 or worse.

From the testimony earlier, one might assume that the railroads were reducing their tax burdens very substantially. While we have gained relief from certain forms of discriminatory taxation, I would like to point out that from 1980 to 1987, the property taxes we paid—that is, the major railroads—to the states increased from $220 million to $287 million. And that occurred while there has been a very drastic reduction in the assets we own. The amount of track miles are down 20 percent. The number of cars we own are down 38 percent. The number of locomotives we own are down 30 percent.

The provision, as we see it, has not only worked as intended, it would be hard to see how it would work without the catch-all provision that in effect stops the states from adding undue burdens on interstate carriers, and that is an approach that the Congress decided on in 1976 because of the damage that was being done. The potential for that damage is still there. It creates an incursion in the state powers, to be sure. But it seems to me the case for the Federal incursion stands every bit as strong today as it did in 1976.

Thank you.

[The statement and questions and answers follow:]

STATEMENT OF RICHARD E. BRIGGS, EXECUTIVE VICE PRESIDENT, ASSOCIATION OF AMERICAN RAILROADS

Mr. Chairman and members of the Subcommittee. I am Richard E. Briggs, Executive Vice President of the Association of American Railroads (AAR).

The AAR is a voluntary, unincorporated, non-profit organization comprised of more than 60 member railroads, including all of the largest freight railroads operating in the United States. Members of the AAR operate 83 percent of all freight railroad mileage, employ 93 percent of all freight railroad workers, and generate more than 94 percent of all freight revenues from railroad operations in this country. The AAR represents its members before Congress, federal agencies and the courts in matters of common concern to the railroad industry.

The purposes of this statement are: (1) to review the reasons which motivated Congress to prohibit discriminatory state taxation of the railroad industry; and (2) to explain why that statutory prohibition, which was passed as Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("Section 306") and later codified at 49 U.S.C. § 11503, is just as necessary today as it was in 1976.

SECTION 306 AND ITS OBJECTIVES

Section 306 is the product of more than 15 years of congressional study concerning the adverse effects of discriminatory state taxation on the nation's railroads and the nation's economy. The legislative history of Section 306 may be summarized as follows:

In 1961, a Special Study Group on Transportation Policies in the United States established by Senate Resolutions 29, 151, and 244, of the 86th Congress, concluded that discriminatory state taxation of railroad property imposed undue burdens on interstate commerce.[1] This study group observed that: (i) railroad operations are capital intensive and require substantial investment in real and personal property; and (ii) because railroads are generally non-resident corporations that cannot easily relocate their property, they are highly vulnerable to state tax discrimination arising from the failure or refusal of states to equalize railroad assessments at the same percentage of value as the property of other taxpayers, or from the imposition of state taxes at discriminatory rates. This study group recommended passage of feder-

Footnotes at end of article.

al legislation to exempt railroad right-of-way from state taxation or, as an alternative, to forbid the discriminatory assessment of property owned or used by interstate carriers.[2]

Over the next fifteen years, Congress considered a series of legislative proposals that would have forbidden state tax discrimination, not only against railroads, but against all common and contract carriers regulated by the Interstate Commerce Commission (*i.e.*, railroad carriers, express carriers, pipeline carriers, motor common and contract carriers, water common and contract carriers, and freight forwarders).[3] Congressional committees conducted extensive hearings on many of these proposals and received into the legislative record numerous statistical studies (based primarily on United States Census Bureau data) that showed the magnitude of state tax discriminatory against railroad property.[4] These studies showed, for example, that discriminatory state taxation had cost the railroad industry more than $900 million from 1960 through 1969.[5]

Congressional committees also recognized that discriminatory state taxation of the railroad industry is high disadvantageous to shippers and consumers and imposes an unjust and undue burden on interstate commerce. As stated in "Report of the Senate Committee on Commerce, Discriminatory State Taxation of Interstate Carriers," S. Rep. No. 1085, 92d Cong., 2d Sess. (1972):

"Ultimately, the shipper and consumer pay the bill for such discriminatory taxation. Not only are such taxes reflected in the transportation costs of goods purchased by the consumer, but also the consumers of the States which do not discriminate are forced to share the costs of burdensome tolls." S. Rep. No. 92-1085, supra, p. 4.

Passage of 306 was strongly supported, not merely by the railroad industry, but by agencies of the federal government responsible for the preservation and development of the nation's transportation system, such as the United States Department of Transportation, Interstate Commerce Commission, and United States Railway Administration. Other proponents of Section 306 included the Railway Labor Executives Association, Congress of Railway Unions, Railway Progress Institute, American Bar Association, National Industrial Traffic League, American Trucking Associations, Inc., Transportation Association of America, Association of Oil Pipelines, and National Association of Motor Bus Owners.[6]

During the long course of congressional deliberations on Section 306, the states were also given ample opportunity to voice their objections. Representatives of state government raised various arguments in opposition to Section 306, many of which are the same arguments now being advanced by certain states for the repeal or amendment of Section 306.

Based upon the legislative record, the Senate Committee on Commerce, and the House Committee on Interstate and Foreign Commerce concluded that: (i) state tax discrimination represented an undue burden on interstate commerce; (ii) state laws which ostensibly guaranteed equitable tax treatment for interstate carriers had not been observed or enforced by the states; and (iii) state administrative and judicial remedies had not afforded interstate carriers an efficient and effective means of obtaining relief from discriminatory state taxation.[7] These committees recommended that Congress establish a clear federal policy against discriminatory state taxation of the railroad industry and create an efficient federal judicial remedy to enforce that policy against the states.

As enacted, Section 306: (i) prohibits states from taxing rail transportation property at ratios of assessed value to true market value higher than those applicable to other commercial and industrial taxpayers throughout the state; (ii) contains a broad provision prohibiting states from imposing other forms of state taxation that result in discriminatory treatment of a common carrier by rail; and (iii) guarantees the railroad industry access to federal court for purposes of enforcing tax equity. Thus, Section 306 prohibits discriminatory state taxation of the railroad industry "in any form whatsoever." *Ogilvie* v. *State Board of Equalization of the State of North Dakota*, 492 F. Supp. 446 (D.N.D. 1980) *aff'd*, 657 F. 2d 204, 210 (8th Cir.) *cert. denied*, 554 U.S. 10 86 (1981).

Section 306 is an integral part of a comprehensive Congressional plan to restore and rehabilitate the nation's rail transportation system. Few federal proposals have received congressional scrutiny comparable to Section 306 and its repeal or amendment should not be undertaken lightly. To weaken Section 306 in any way would deal a serious blow to the railroad industry and to the thousands of companies that use the nation's surface transportation system to move their goods.

NECESSITY FOR SECTION 306 IN THE CURRENT ECONOMIC ENVIRONMENT

Section 306 and concomitant regulatory reforms (such as the Staggers Act of 1980 and the Economic Recovery Tax Act of 1981) have strengthened the nation's rail transportation system. Such reforms have enabled the railroad industry to: (i) make major investments in new track (which, in turn, have significantly improved railroad safety and reduced the industry's loss and damage payments to shippers); (ii) abandon unprofitable lines more expeditiously; (iii) negotiate stable, long-term contracts with shippers; and (iv) improve the physical efficiency of railroad operations.

Such reforms have also greatly benefited the nation's shippers and consumers. In constant dollars from 1981 to 1987, railroad freight rates as a whole declined by about 7.4 percent. During the same period, railroad coal rates declined by about 8.3 percent and railroad grain rates declined by approximately 43.4 percent. Indeed, in every year since 1982, railroads have charged less on average for each ton-mile of freight carried than they did in 1981.

While Section 306 has enabled the railroad industry to reinvest dollars that would otherwise be paid in discriminatory taxes, Section 306 has not produced tax windfalls for the railroad industry. Interstate Commerce Commission data show that accruals for ad valorem taxes for all the states and their local subdivisions by Class I railroads since the effective date of Section 306 (i.e., for the tax years 1980–1987), have actually increased in the aggregate from approximately $220 million in 1980 to $287 million in 1987. This increase has occurred despite shrinkage in the railroad industry's physical plant and the abandonment or retirement of substantial amounts of railroad operating property that were previously subject to taxation.[8]

Although Section 306 has been in effect for nearly a decade, state tax discrimination against the railroad industry is a continuing and recurring problem in many states and, absent the rights and remedies guaranteed by Section 306, the industry could not effectively combat it. Tax discrimination against the industry continues to occur both in the area of property taxes and in the area of non-property taxes.

In the property tax area, states continue to assess rail transportation property at higher percentages of value than other commercial and industrial taxpayers. For example, until recently California has refused to accord the railroad industry the benefits of Proposition 13 valuation rollbacks [9] and Georgia has refused to reduce railroad assessments to the average assessment level prevailing throughout the state.[10]

In many states, assessing agencies continue to overvalue rail transportation properties for purposes of ad valorem taxation. For example, Oklahoma valued Burlington Northern's rail transportation property for the 1982 tax year at $3.6 billion. The railroad brought suit under Section 306 and, at trial, a special master appointed by the court has preliminarily determined that Burlington Northern's system value actually did not exceed $1.9 billion.[11]

Furthermore, an increasing number of states have established complete or partial exemptions for major classes of locally-assessed business personalty, while continuing to subject the personalty of centrally-assessed rail carriers and public utilities to tax. For example, between 1959 and 1984, the number of states taxing non-farm machinery and equipment decreased from 47 to 40; the number of states taxing business inventories decreased from 46 to 20; and the number of states taxing agricultural personalty decreased from 42 to 17. See, Netzer, "Personal Property Taxation in the United States," the Urban Research Center of New York University (1985). More recent studies indicate that, by 1989, more than 30 states will have totally exempted business inventories from taxation. See, "State Tax Review," (CCH) (July 26, 1988).

Many of the states that now exempt major classes of business personalty, (e.g., Florida, Iowa, Nebraska, South Dakota), established such exemptions only after Congress enacted Section 306. The inevitable effect of such exemptions is to narrow the personal property tax base and to shift the burden of property taxation to those, such as the railroads, whose property remains subject to tax. Only Section 306 stands as a bulwark against such discriminatory exemption schemes.[12]

State tax discrimination against the railroad industry also continues to exist in the area of non-property taxation (*e.g.*, state gross receipts taxes, excise taxes and other forms of non-property taxation). Prior to the passage of Section 306, many states imposed discriminatory gross receipt taxes upon the railroad industry (e.g. Alabama, Louisiana) and/or burdensome regulatory fees that bore little relationship to state services and were, in operation and effect, merely substantial tax levies against the industry (*e.g.*, Oregon). By relying on Section 306, the industry was able to eliminate such onerous tolls and preserve the property tax benefits of Section 306.[13]

Following passage of Section 306 in 1976, various states also sought to offset revenue reductions in the ad valorem tax area by imposing new excise taxes on incidences of taxation that were peculiar to railroad operations. Iowa, for example, attempted to impose a "loaded mile" tax on private car companies and Iowa and Minnesota attempted to impose heavy fuel taxes on "diesel fuel used to propel trains." These non-property taxes would have imposed substantial financial burdens on the railroad industry and, in some cases, would have more than doubled the railroads' total tax liability to the state. Although each of these excise taxes was ultimately stricken under Section 306(i)(d), a provision prohibiting the imposition of any other discriminatory tax, the absence of such a provision would have rendered the property tax benefits of Section 306 an economic nullity.[14]

Some opponents of Section 306 may argue that the section prohibiting any other discrimination tax provision unfairly favors the railroad industry because other federal anti-discrimination statutes relating to airline and motor carrier taxes [15] do not contain a provision similar to Section 306(1)(d). There were, however, reasons for this apparent discrepancy.

First, with respect to the airline industry, a prohibition against any other tax was not so important because the airline industry is the beneficiary of an earlier federal statute, 49 U.S. § 1513(a), which prohibits states from levying taxes on gross receipts derived from the carriage of persons travelling in air commerce. Second, the non-property taxes to which motor carriers are subject in most states (*e.g.*, special fuel and excise taxes) are structured so that the revenues from these taxes are dedicated to highway maintenance and improvement which of course, directly benefit the trucking and busline industries.[16]

The litigation history of Section 306 cases also confirms Congress' wisdom in granting railroads and private car companies access to federal court for the resolution of tax disputes. By invoking the injunctive powers of federal district courts, the railroads have, in most cases, vindicated their rights expeditiously and efficiently.

Absent federal jurisdiction, it is highly problematical whether the railroad industry could reasonably enforce a federal prohibition against discriminatory taxation. The federal anti-tax injunction act 28 U.S. § 1341 (to which Section 306 is an express exception), effectively precludes state taxpayers from litigating in federal court except under the most extraordinary circumstances. See, e.g., *Fair Assessment in Real Estate Ass'n, Inc.* v. *McNary*, 454 U.S. 100 (1981), Furthermore, as numerous congressional committees recognized during the course of deliberations on Section 306, state administrative and judicial remedies frequently require railroads to commence multiple actions to enforce their rights and such remedies tend to be extraordinarily expensive and time consuming.[17]

In this regard, little has changed. Recent legislation in Georgia, for example, may require railroads and public utilities to file suit in each county in which they operate in order to recover excessive ad valorem taxes.[18] For some railroads, this could require 45 or more separate suits in the same state for a single tax year.

Even where utilities have successfully obtained a judicial declaration from state courts of their right to equality of taxation, state courts have refused to grant utilities relief for the tax years at issue and have granted prospective relief only. See, e.g., *Rocky Mountain Oil and Gas Association* v. *Wyoming St. Bd. of Equal.*, 749 P. 2d 221 (Wyo. 1987); *AT&T Communications* v. *Wyoming State Bd. of Equal.*, No. 114-153 (Wyo. Dist. Ct. 1988). By contrast, the federal injunctive remedies available under Section 306 ensure that tax discrimination is prevented, and that the railroads obtain equity from the tax years at issue.

Section 306 is not a grant of preferential tax treatment for the railroad industry and has not, in any sense, undermined or enervated the nations' property tax system. Under Section 306, states have unfettered discretion to tax their citizens in any manner they choose, so long as they do not treat railroads differently from other commercial and industrial taxpayers.

Although some states currently may be experiencing fiscal difficulties, no state can argue rationally that its fiscal problems are attributable to Section 306. Certainly some of the fiscal difficulties must be laid at the door of state legislatures, not the railroad industry. As noted earlier, state after state has either totally exempted personal property from taxation, or exempted significant portions of the business personal property tax base. For example, since 1977, Nebraska has systematically exempted an estimated $9 billion of personal property from the tax base (over 75 percent of all business personally), resulting in a loss of revenue to local governments of approximately $230 million in taxes annually.

Although Section 306 and other regulatory reforms have strengthened the railroad industry and enabled it to compete more effectively with other transportation modes, key segments of the railroad industry remain financially marginal and all

rail companies are highly vulnerable to truck and barge competition that (unlike the railroads) do not have to pay for property taxes on their rights-of-way.

When measured by the basic test of long-run economic viability—a return on investment equivalent to the current cost of capital—the rail industry's "ROI" for the years 1981 through 1987 trailed its current cost of capital. For example, in 1987 the ICC determined the industry's cost of capital to be 11.6 percent. Actual "ROI" for the industry was only 5.6 percent—slightly more than one half of the required return to be revenue adequate. Compared with other industries, the railroads return on equity has clearly been substandard for many years and continues to be today. In 1987, electric utilities averaged a return on equity of 14.5 percent and "all industry" averaged a return of 13.2 percent. By contrast, Class I railroads averaged a return on equity for 1987 of only 8.1 percent. For 1986 and 1987, the railroad industry return on equity ranked dead last as compared with 25 industries in the "Fortune 500".

Increased competition for intercity freight from carriers that do not have to pay to acquire or fully maintain their rights-of-way has also eroded the railroad industry's market share and further depleted its ability to withstand discriminatory taxes. In 1987, the railroads' share of all intercity freight transportation revenues in the United States fell to an all-time low of 15.1 percent, down from 20.4 percent in 1980. Trucks, by contrast, accounted for approximately 75 percent of such revenues. For 1987, the railroads' share of all intercity freight traffic (in terms of ton-miles) was only 36.3 percent, with the lion's share (41.4 percent) being carried by truck-lines and water carriers.

Finally, the railroad industry's costs of maintaining its track structure and supporting facilities totaled nearly $3.5 billion in 1987 and accounted for more than 14 percent of the industry's total operating expenses. Quite obviously, the railroad industry's task in meeting the competition of intercity carriers who do not have to make such large annual expenditures is difficult enough without adding the burden of discriminatory state taxes.

CONCLUSION

For 1987, capital expenditures by Class I railroads exceeded $3.1 billion. For 1987, Class I railroads employed over 248,000 employees distributed throughout all 48 states of the continental United States and paid these employees $9.4 billion. If Section 306 is repealed, or weakened by amendment, dollars going into rail plant, equipment, jobs and services will be lost to discriminatory taxes.

What certain state and local governments are seeking is restoration of the freedom to discriminate against the railroad industry and to shift their local ad valorem tax burdens to interstate commerce. This should not be countenanced. All the railroads have ever sought, and all they seek now, is tax equity, i.e., to be treated for purposes of state taxation in the same manner as the majority of other commercial and industrial taxpayers in the state. As stated by the United States Court of Appeals for the Fifth Circuit in *Kansas City Southern R.Y.* v. *McNamara,* 817 F.2d 368, 375 (1987):

"The only simple way to prevent tax discrimination against the railroads is to tie their tax fate to the fate of a large and local group of taxpayers. A large group of local taxpayers will have the political and economic power to protect itself against an unfair distribution of the tax burden."

Congress long ago determined that tax equity for the railroad industry was essential to preserve and maintain the nation's rail transportation system. That goal is as important today as it was in 1976. Tax discrimination against the industry is a recurring problem and the industry must have some means of combating it. Section 306 is an effective and efficient tool for this purpose and must be preserved.

Section 306 is important also to the thousands of shippers which rely on and pay for rail service. That is why the National Industrial Traffic League—The nation's largest shipper organization—continues to support the present procedures and why others such as the Railway Labor Executives Association and Railway Progress Institute who strongly supported the enactment of this provision in 1976 remain staunchly opposed to any significant revision.

APPENDIX A TO THE STATEMENT OF RICHARD E. BRIGGS

The following case histories illustrate the importance of Section 306(1)(d) in preventing state tax discrimination of the railroad industry and in fulfilling the economic objectives of Section 306:

a. *Trailer Train Co., et al.* v. *Gerald Bair,* No. 83-528-A (S. Iowa, 1984), *aff'd* 765 F.2d 744 (8th Cir.) *cert. denied,* 106 S. Ct. 572 (1985).

For many years prior to 1978, the State of Iowa imposed an ad valorem tax on the cars of private rail car companies operating in the state. In 1978, well after passage of Section 306, Iowa repealed its ad valorem tax on rail car companies and replaced it with a "railway mileage tax," i.e. an excise tax imposed at the rate of 1¼ cents per "loaded mile" travelled in and through Iowa by rail car companies during a given calendar year. Since rail car companies were the only entities that generated "loaded miles" within the meaning of the act, only rail car companies were subject to the tax. For the major rail car company that operated in Iowa during 1980 (Trailer Train Company), the state's shift from an ad valorem tax to a "loaded mile" tax increased the company's tax liability from approximately $31,000 annually to over $1,000,000 annually.

b. *Atchison, Topeka & Santa Fe R.Y.* v. *Bair,* 338 N.W. 2d 338 (Iowa 1983), *cert. denied,* 465 U.S. 1071 (1984).

In 1981, following passage of Section 306, Iowa imposed (in addition to all other taxes to which railroads were subject) a special excise tax on diesel fuel consumed in the propulsion of railway vehicles in Iowa. Since interstate railroads were the only major class of taxpayer that used diesel fuel to propel railway vehicles, railroads were effectively the only taxpayers subject to this excise tax. For the 1980 tax year, the major railroads operating in Iowa paid, in the aggregate, about $7.3 million in ad valorem taxes. Iowa's new special excise tax on diesel fuel, which was imposed at the rate of 8 cents per gallon, was projected to cost the railroads an additional $7.3 million per year.

c. *Burlington Northern Railroad Co., et al.* v. *Thomas J. Triplett,* No. 3-87-561 (Minn. 1987).

In May 1987, the Minnesota legislature imposed a 17 cents per gallon excise tax on diesel fuel used to propel a train. This new excise tax (which was imposed in lieu of an existing 6% sales tax on diesel fuel and in addition to all other state and local taxes for which the railroad were liable) substantially increased the annual Minnesota tax liability of all railroads in the state. For example, for the 12-month period prior to the enactment of this excise tax, Burlington Northern's annual tax liability to Minnesota under the sales and use tax for purchases of diesel fuel totalled approximately $743,000. By contrast, Burlington Northern's annual tax liability under the new railroad excise tax was projected to exceed $5.95 million annually. The total annual tax liability under this excise tax for diesel fuel consumption for all major railroads in Minnesota was estimated to increase by approximately $9.5 million annually. Based upon average diesel fuel prices prevailing at the time of enactment, this excise tax represented a 32 percent increase in the railroads' cost of delivered fuel.

Absent a provision prohibiting "another tax" which discriminates, states are free to circumvent the property tax restrictions of Section 306 and substitute one form of discrimination for another. Absent Section 306(1)(d), railroads in Iowa and Minnesota would once again have become the victim of egregious state tax discrimination.

FOOTNOTES

[1] S. Rep. No. 445, 87th Cong., 1st Sess. (1961) (the "Doyle Report").

[2] *Id.,* at 463, 465.

[3] *See, e.g.,* H.R. 736, 88th Cong., 1st Sess. (1963); H.R. 4972, 89th Cong., 1st Sess. (1965); S. 2988, 89th Cong. 2d Sess. (1966); H.R. 1489, 90th Cong., 1st Sess. (1967); S. 927, 90th Cong. 2d Sess. (1968); S. 2289, 91st Cong., 1st Sess. (1969); S. 3945, 92d Cong., 2d Sess. (1972); S. 1891, 93d Cong., 1st Sess. (1973); H.R. 5385, 93d Cong., 2d Sess. (1974); S. 2841 94th Cong., 1st Sess., (1974); S. 2718, 94th Cong., 1st Sess. (1975).

[4] *See, e.g., Hearing on H.R. 736 and H.R. 10169 Before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce,* 88th Cong., 2d Sess. (1964); *Hearings on H.R. 4962 and Identical Bills Before the House Committee on Interstate and Foreign Commerce,* 89th Cong., 2d Sess. (1966); *Hearings on S. 927 Before the Subcommittee on Surface Transportation of the House Committee on Commerce,* 90th Cong., 1st Sess. (1967); *Hearing on S. 2289 Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce,* 91st Cong., 1st Sess. (1969).

[5] S. Rep. No. 92-1085, 92d Cong., 2d Sess. (1972), pp. 4, 6.

[6] *See, e.g.,* lists of witnesses and statements contained in the record of hearings cited in footnote 4 of this statement.

[7] *See, e.g.,* S. Rep. No. 1483, 90th Cong., 2d Sess. (1968); S. Rep. No. 91-630, 91st Cong., 1st Sess. (1969); S. Rep. No. 92-1085, 92d Cong., 2d Sess. (1972); H.R. Rep. No. 93-1381, 93d Cong., 2d Sess. (1974).

[8] Between 1980 and 1987, miles of rail line owned by Class I railroads decreased from about 164,800 to only about 132,200, a decrease from nearly 20 percent. During the same period, the number of freight cars owned and leased by Class I railroads declined from about 1,100,000 in 1980 to only about 681,000 in 1987, a decrease of about 38 percent. Similarly, the number of freight locomotives owned by Class I railroads declined from about 28,350 in 1980 to only about 19,900 in 1987, a decrease of nearly 30 percent.

[9] *See, The Atchison, Topeka & Santa Fe Ry., et al.*, v. *Board of Equalization of the State of California, Master Consolidated*, No. C-81-4365 DLJ (N.D. Cal.).

[10] *See, Southern Ry., et al.* v. *State Board of Equalization*, No. 1; 86-CV-2224-HTW (N.D. Ga.).

[11] *See, Burlington Northern R.R.* v. *Oklahoma Tax Commission, et al.*, No. C-83-419-R (W.D. Okla.).

[12] *See, Dept. of Revenue of State of Florida* v. *Trailer Train Company*, 830 F.2d 1567 (11th Cir. 1987); *Burlington Northern R.R.* v. *Bair*, 584, F. Supp. 1229 (S.D. Iowa, 1984), *aff'd*, 766 F.2d 1222 (8th Cir. 1985); *Trailer Train Co.* v. *Levenberger*, No. CV-87-L-29 (D. Neb., Order, Dec. 11, 1987).

[13] *See, Alabama Great Southern Ry.* v. *Eagerton*, 501 F. Supp. 1044 (M.D. Ala. 1980) (gross receipts tax) *rev'd*, 633 F.2d 1036 (11th Cir. 1981); *Kansas City Southern Ry.* v. *McNamara*, 817 F.2d 368 (5th Cir. 1987) (gross receipts tax); *Union Pacific Corporation* v. *Public Utility Commission*, No. 86-778-PA, (D. Ore., Order, July 14, 1987) (regulatory "fee").

[14] Three case histories set forth in appendix A to this statement illustrate the importance of the Section 306(1)(d) "catch-all" provision in preventing state tax discrimination against the industry and in fulfilling the economic objectives of Section 306.

[15] *See, e.g.*, 49 U.S.C. § 11503a (Motor Carriers and Buslines) and 49 U.S.C. § 1513d (Airlines).

[16] *See, e.g.*, Minn. Stat. Ann. § 296.17, subd. 8.

[17] *See*, S. Rep. No. 92-1085, 97th Cong., 2d Sess. (1972), p. 4-5.

[18] H.B. No. 337, effective January 1, 1989.

Richard E. Briggs
Executive Vice President

ASSOCIATION
OF AMERICAN
RAILROADS

October 13, 1988

Honorable Ernest F. Hollings
Chairman
U.S. Senate
Committee on Commerce, Science
and Transportation
Washington, DC 20510-6125

Dear Mr. Chairman:

In your letter of September 27, you requested a response to questions raised by the Chairman of the Subcommittee on Surface Transportation, Senator Exon. I will endeavor to respond to this inquiry herewith.

Question #1 asks for a "rationale" for the differences in legislative treatment of the various modes of interstate transportation industries. Historically, the railroad industry was one of the leading victims of discriminatory taxation by many state tax assessors who took advantage of the "permanence" of the railroad rights-of-way in the state. Without any effective protection in the courts of the state, assessments at higher levels than other business properties was the norm and not unusual. In testimony before this Committee in 1972, using a sampling of 16 states, it was shown that the assessment levels of taxation on railroads was 38.31 percent higher than other business properties. There was no federal protection against such discrimination. This was cured by the 1976 "4R Act". It should be recognized that the same problems which prompted Congress to act in 1976 continue in several states as more fully described in my September 16 submission.

With respect to the airline industry, a prohibition against certain other taxes was already in place. The airline industry is the beneficiary of an earlier federal statute enacted in 1973, 49 U.S.C. §1513(a), which prohibits states from levying taxes on gross receipts derived from the carriage of persons traveling in air commerce. Also, many of the non-property taxes to which motor carriers are subject in most states (e.g., special fuel and excise taxes) are structured so that the revenues from these taxes are dedicated to highway

50 F Street, N.W., Washington, D.C. 20001 (202) 639-2403

maintenance and improvement which of course, directly benefit the trucking and busline industries. Moreover, the railroad industry was considered more vulnerable to tax discrimination because it had huge investments in its track structure whereas the airline, trucking, and barge industries used public rights-of-way that are not subject to property taxes.

The pipeline industries, principally interstate natural gas pipelines, have pursued the same federal remedy as the railroad industry. Recently the House Judiciary Committee reported a bill, H.R. 2953, which is substantially the same as 49 U.S.C. §11503, except that it directly amends the anti-injunction provisions of 28 U.S.C. §1341.

Question #2 asks for an assessment of the cumulative effect on state revenues "if all of your industries, as well as other interstate industries such as electric utilities and telecommunications, were granted similar relief." There should be no overall, cumulative adverse impact on state revenues because states remain free under this legislation to raise necessary revenues from industry so long as they do not tax the property of one industry in a discriminatory manner. In the immediate shortrun, it is difficult to calculate the impact, if any, of relief from discriminatory taxation on each of the above mentioned industries inasmuch as the data with respect to other businesses is not readily available to railroad economic experts. However, as a matter of equity it is incumbent on state governments to evaluate the extent to which interstate enterprises are being assessed at higher levels than other commercial and industrial properties and distribute the tax burden in an even-handed manner across the board. Every state Board of Equalization has a responsibility to achieve equity in the administration of property taxation within its jurisdiction.

Congress has looked at this question on an industry-by-industry basis at such time as the discrimination has been brought to its attention. Congress, in turn, has enacted provisions intended to prevent any such discrimination in state taxation based on such facts as presented. Extending relief to other interstate businesses should properly be done on a case-by-case basis.

Question #3 relates to the invocation of the 4R Act to challenge public utility commission "fees" as discriminatory taxes. State regulatory fees must be evaluated on a case-by-case basis. If a state levy is, in practical operation and effect, a true "fee," i.e., a levy that is reasonably related to the actual cost of providing governmental services from which the railroad derives special benefit, the levy is not likely to be subject to attack under 49 U.S.C. §11503. A plethora of such fees are exacted today from railroads and have not been challenged. If, however, the state levy is (as was the case in Oregon) a substantial, involuntary assessment against the railroads for programs which primarily benefit the public, the levy may well be a "discriminatory tax" that is subject to scrutiny under §11503.

49 U.S.C. §11503 was intended to prohibit discriminatory state taxation of the railroad industry in all of its guises. Southern Railway Co. v. State Board of Equalization, 715 F.2d 522 (11th Cir. 1983), cert. denied, 465 U.S. 1100 (1984). Thus if a state fee is in reality a discriminatory "tax," it can, and should be, stricken under §11503.

Question #4 relates to the importance of Section (b)(4) in the effectiveness of the 4R Act prohibition against discriminatory state taxation.

The provisions of 49 U.S.C. §11503 (b)(1), (2), and (3) require a comparison between the ad valorem taxes imposed on the railroad industry and those imposed on "all other commercial and industrial property" within the same taxing jurisdiction. "Commercial and industrial property" is defined by §11503 (a)(4) as business property "devoted to a commercial or industrial use and subject to a property tax levy." Because Section 306 defines commercial and industrial property as property "subject to a property tax levy," federal courts have been reluctant to invoke §11503 (b), (1), (2), or (3) as a remedy against various forms of property tax discrimination that result from the states' exemption of non-railroad business property from the ad valorem tax. See, e.g., Ogilvie v. State Board of Equalization of the State of North Dakota, 492 F. Supp. 446 (D.N.D. 1980), aff'd 657 F.2d 204 (8th Cir. 1981), cert. denied, 554 U.S. 1086 (1981), which involved North Dakota's effort to assess railroad personal property while exempting all locally-assessed business personalty. Federal courts have, however, interpreted the provision of §11503(b)(4), "another discriminatory tax", to prohibit exemption-type discrimination. See, e.g., Ogilvie, supra, and Department of Revenue of State of Florida v. Trailer Train Co., 830 F.2d 1567 (11th Cir. 1987). Absent this "catch-all" provision, states would remain free to exempt selected business properties and to shift the ad valorem tax burden to the railroad industry.

Furthermore, absent a general prohibition against all forms of discriminatory state taxation, states would remain free to impose other discriminatory taxes on the railroad industry and to eliminate the economic benefits that flow from the statutory prohibition. My testimony cites numerous examples of such punitive new taxes which have been tried in various states since the 4-R Act banned property tax discrimination. Absent this general prohibition, the railroads might well be facing more discriminatory taxes than they did when the Congress enacted this legislation.

Sincerely,

Richard E. Briggs

Richard E. Briggs

-3-

Senator EXON. Mr. Briggs, thank you very much for your testimony. We will have some questions later. And I would remind this panel, as I did the previous one, that we probably won't have time for all of the questions, but we hope that you will, as you have so well in the past, respond to written questions as soon as you can.

Mr. Donohue.

STATEMENT OF THOMAS J. DONOHUE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, AMERICAN TRUCKING ASSOCIATIONS, INC.

Mr. DONOHUE. Thank you, Mr. Chairman. I am very happy to be here today, and ATA appreciates your calling these hearings. It

lets me raise a number of issues you may not have had in mind when you invited your witnesses today.

Mr. Chairman, the interstate trucking industry in this country spends $1 billion a year on the paperwork that is required so that it can pay its taxes to the states. If you take a look at the chart that is off to my side, you will see the tax credentials a single tractor must have in order to run legally in the 48 contiguous states. You could spend a day going through all of the paper, all the indicia, all the forms, and all the stickers, and you would find that, if you owned one tractor that ran across this country, you would have to hire two secretaries to figure out how to do it.

In addition to that, Mr. Chairman, this package, which is our present from the states, represents what it takes to file the taxes and to pay them to run a truck in 48 states. One truck.

If you think about that, of the more than 3 million trucks that operate around this country, a half of million of them run in all 48 states. This package weighs 5 pounds. At 5 pounds of paper per truck, that is 1,250 tons of paperwork we turn over to the states every year. And that doesn't count the hundreds of thousands of trucks that run in 20 states, 30 states, or 40 states. So, when you get all finished, we are probably talking about 5,000 tons of paper that we file with the states every year.

Now, if we spend $1 billion to do that, the states have to spend an amount equal to process it. We could save a lot of trees in this country if we could do something about this. We might even get the environmentalists to join with us on this serious problem.

Now, I know this sounds like an old story to you, Mr. Chairman. That is because it is. We were here some years ago testifying about what a hindrance to interstate trucking state tax administration had become. At that time, the National Governors' Association promised Congress, on behalf of the states, that it would do something about it.

You see the chart next to me looks a little tattered. That is because we have been carrying it all over the country promoting the NGA effort toward tax simplification for years now. We can use the same chart today because in essence nothing has happened. We have 40 states in the IRP. We had 30 before the Governors' association acted.

For all they have promised, the states have only made changes that can be best termed as cosmetic, or well-intentioned. But the governors who led the charge are no longer governors. And when the bureaucrats in the states got a hold of what the governors wanted to do, well, it's a long time between the plan and the fruition.

The states have had their chance to fix it, but we now need some help from the Federal Government to get standards that get it fixed.

Mr. Chairman, besides the paperwork I have just talked about, the interstate trucking industry has put up with a variety of discriminatory state taxes. For a decade now, we have been fighting these taxes which are the same kind of taxes the railroads were able to avoid because of their protective legislation. And we have fought these taxes right up through the Supreme Court, where last year we won a landmark victory declaring a certain type of taxes

as discriminatory. But it cost us millions and millions of dollars to get there.

And some states—seeing it easier to tax an out-of-stater, as was testified to before, because they don't vote—are finding some very, very creative ways to tax interstate trucking. Michigan, for example, says a trucking company that merely travels on its roads, the Federal highway system, besides paying its share of the highway taxes, must now pay a corporate business tax, although it does no Michigan business at all. And although Michigan never told the industry these taxes were to be paid, it is billing companies for up to six years of back taxes, plus up to 100 percent penalties. We recognize that when we do business in a state, have terminals there, and employ people there, we ought to pay those taxes.

But Mr. Chairman, we can't afford to keep wasting that billions of dollars a year in useless paperwork. We can't afford to keep paying the creative state taxes, some of them blatantly illegal, that discriminate against interstate commerce. We can't afford it, the Nation's economy can't afford it, and our competitive position in the worldwide economy cannot afford it.

We are not suggesting that the trucking industry not pay the taxes the states think they need to maintain the roads and enforce safety. We are saying that we should not pay discriminatory taxes and we ought not spend a king's ransom to fill out the paperwork.

And just as much, Mr. Chairman, we need some help between the transportation modes. Ten years ago in the 4–R Act, Congress gave the railroads protection against all sorts of discriminatory state taxes and gave them access to the Federal courts to enforce it. But the trucks don't have that access. Although we can go there on property taxes, on any other discriminatory tax, we have to go through every state court to finally get to a Federal court, which is the only court that can efficiently decide on a matter of interstate commerce. Access to Federal Courts has been useful to the railroads. It has not upset the Federal courts, and it would be very useful to us.

We need the same protection from illegal discriminatory taxes and we need access to the Federal courts. It is completely unacceptable for the government to favor the railroads and the airlines, in some instances, while ignoring the more pressing needs of the mode that hires the most people, travels the most miles, and carries the most freight.

In summary, Mr. Chairman, we would like you to help us get rid of the paperwork, give us equal protection under the law and access to the Federal courts and let us compete fairly with our good friends from the railroads. We deserve it. We're an important part of the economy.

Thank you very much, Mr. Chairman.

[The statement and questions and answers follow:]

STATEMENT OF THOMAS J. DONOHUE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, AMERICAN TRUCKING ASSOCIATIONS

INTRODUCTION

I am Thomas J. Donohue, President and Chief Executive Officer of the American Trucking Associations (ATA). I welcome the opportunity to present our views on the issue of state taxation of interstate motor carriers.

ATA is the national trade association of the trucking industry. Through its 51 affiliated trucking associations located in every state and the District of Columbia, 10 affiliated conferences and several thousand motor carrier members, ATA represents every type and class of motor carrier in the Nation: for-hire and private, regulated and exempt.

The trucking industry is composed of more than 260,000 American firms, and accounts for 77% of all freight transportation revenues in this country. The industry employs 7.4 million Americans and generates annual revenues in excess of $200 billion. In that process it comes in contact with literally thousands of federal, state and local taxing agencies.

Mr. Justice Holmes once said: "Taxes are the price we pay for the benefits of a civilized society." If this is true, then the motor carrier industry must be the most civilized of industries because it pays a tremendous amount of taxes to numerous taxing entities. In 1986, the last year for which we have data, the industry paid $10.9 billion in state operating taxes and $6.9 billion in federal operating taxes, for a combined total of $17.8 billion.

This $17.8 billion does not include the general business taxes the industry pays to federal and state governments: income taxes, sales taxes and property taxes. According to a 1983 study conducted by the Joint Committee on Taxation, trucking had the highest effective federal corporate income tax rate of all industries surveyed. In 1986, federal and state income taxes consumed a third of all pretax dollars. While the 1986 Tax Reform Act went a long way in leveling the playing field, the fact remains that trucking is a very highly taxed industry, both on the federal and state level.

The goal of the trucking industry is to be a responsible and a profitable corporate citizen in every state in which it operates—and that includes paying taxes. Unfortunately, the complicated nature of state taxation today makes that goal a virtual impossibility. Trucking is a national industry. However, if it is to continue to play its vital role in keeping this nation productive and competitive, it needs a drastically simplified system of state taxation.

Let me categorically state we are not suggesting that the states be restricted in the dollar amount of taxes that they can require from the industry. Interstate trucking needs good roads. We fully realize the necessity of paying for the construction and maintenance of the nations's highways system. We know good roads are not cheap to construct or maintain. We will continue to pay our fair share.

We object, however, to the waste of industry, as well as state, resources inherent in the current state tax collection system. What we are recommending is that states be restricted in the form of the taxes they impose and the process they use to collect them.

The industry seeks two basic elements in state tax systems: equity in law and practice; and efficiency in administration.

We have attempted for over 10 years to achieve those goals through several means. The industry has spent millions of dollars in legal fees to challenge discriminatory state taxes. The recent ATA victory in the United States Supreme Court in which the Pennsylvania axle tax was found to discriminate against interstate commerce had alone a legal bill in excess of $1 million. This is only one of many discriminatory state tax laws which the industry has been forced to challenge in state court. Clearly court action is both costly and time-consuming, but it is often our only effective resort.

We have also attempted to work on a direct basis with state officials to ease the administrative burden associated with state tax compliance. This effort has had some success. However, it has also had its dismal failures. The industry's recent attempts to work with Kentucky officials concerning their regulation on placement of identification numbers on vehicles met with complete resistance. The position taken by Kentucky officials could result in the industry spending millions of dollars to move ICC numbers, unit numbers and fuel tax numbers which are already plainly displayed on the vehicle to another location on that same vehicle merely to satisfy the whim of one state.

The motor carrier industry can no longer rely solely on litigation and persuasion to address its needs regarding state taxation. It needs federal standards for state taxation both as to the form these taxes may take and the process by which they are collected.

State and local taxes on interstate motor carriers fall into two basic categories: Operating taxes—taxes that are paid by virtue of a carrier's use of the roads and general business taxes—taxes that, are paid by business concerns whatever their nature.

OPERATING TAXES

With a significant amount of the Federal Highway Trust Fund sequestered, state and local tax collections for highways are becoming more and more important to the maintenance of the nation's road system. Interstate motor carriers contribute a large proportion of these tax payments. All told, the states collect over $10 billion in highway operating taxes from motor carriers every year. These state operating taxes consist of: Registration fees up to $2,200 per vehicle, fuel taxes up to 27 cents per gallon; mileage taxes of up to 8 cents per mile (equivalent to 40 cents per gallon fuel tax); flat taxes, including indicia fees, up to $25 per vehicle.

The provisions of these operating taxes differ from state to state, tax periods differ, filing dates differ, rates differ and state enforcement agencies differ. Often agencies in the same state don't even communicate with each other, although each is involved in motor carrier taxation and compliance.

The system of state road taxes, taken as a whole, is a tangle of mismatched tax laws and regulations that is a notorious embarrassment to good government and good tax administration. FHWA has estimated that carriers must pay a billion dollars every year in administrative paperwork just to comply with state highway tax laws and regulations.

Most of this enormous sum represents nothing more than waste. It is one of the worst examples of what happens in a federal system when the states are permitted a free hand to tax an essentially interstate part of the economy—in this case, interstate motor carriers. Moreover, this billion dollar figure does not include the additional millions which states waste on their own administrative costs. As a result, conceivably upwards of $2 billion is wasted annually by the motor carrier industry and the states in excessive, needless paperwork.

The National Governors' Association project

The inequities and burdens of state taxation of the motor carrier industry have been recognized as a severe problem for some years now. The difficulties were documented in the FHWA Report to Congress required under Section 19 of the Motor Carrier Act of 1980. Thereafter, Congressional concern over state motor carrier taxation was in large part responsible for the National Governors' Association (NGA) Motor Carrier Project. In 1985 the states, through the NGA, began an unprecedented project, funded in large part by federal money, to voluntarily create a uniform system of administration for state taxes on the motor carrier industry.

The NGA project is now nearly over, and its results can be assessed. With one exception, to be mentioned later in connection with fuel taxes, the accomplishments of the states in the last few years may be termed cosmetic. The states have proven unable—or unwilling—to do more. What the NGA project has really served to show is that the taxation of the interstate trucking industry is an area in which state powers must conform to federal standards.

Federal Standards

We suggest that Congress establish a two-structure standard for state taxation of the motor carrier industry. This two structure system should consist of:

1. Registration fees. This is the annual fee a vehicle pays to enter on the highways of a jurisdiction; it represents the basic built-in cost of the roads on which the vehicle will travel.

2. Fuel Taxes. The vehicle's fuel tax liability is directly related to the amount it actually uses those roads, and provides the means by which the state compensates itself for that use. Diesel differentials are available to address any concerns about fuel consumption not adequately measuring pavement wear.

All other state and local operating taxes on interstate motor carriers should be prohibited.

We further suggest that the two-structure standard be administered through the terms of the International Registration Plan and the International Fuel Tax Agreement.

IRP and IFTA

Both registration fees and fuel taxes are associated with an interstate agreement for their administration—for vehicle registration, the International Registration Plan (IRP), for fuel taxes, the International Fuel Tax Agreement (IFTA). In both these agreements, the carrier's base state collects the taxes for all states, audits the return and redistributes the revenue based on carrier operations. The IRP has been in operation for some 15 years and it has 40 member jurisdictions. It has over and over again proven its worth both as an efficient tax-collection system for the states and as an effective means of easing the compliance burden on interstate motor car-

riers. Perhaps more important, the growth of the IRP has been the product of a state/industry cooperation.

IFTA, the fuel tax agreement, is newer, having been in place since 1983. It will begin 1989 with nine member states. Nevertheless, it is the major achievement of the NGA Uniformity project. Based in many respects on the IRP, it has all the strengths of the older agreement. In short, IFTA is the best hope of the trucking industry for a way out of the thicket of current state fuel use tax laws. However, if the industry is to be in a position to help the Nation's economy maintain its global competitiveness, it cannot wait for full state membership in IFTA.

Elimination of Mileage Taxes

One result of the recommended changes in the form of state taxes would be to end the immensely burdensome and inefficient apparatus of state mileage taxes. Eleven states currently levy taxes on the motor carrier industry that are generically referred to as mileage taxes. In varying ways, all these taxes are calculated according to a vehicle's weight (or, in one state, the number of its axles) and its mileage within the state. Although such a tax might, on the surface, seem a plausible way to compensate for the actual use of the roads, these taxes are unfair and discriminatory both in theory and in practice. We think it is telling that the major (and at times only) proponents of mileage taxes have been the motor carriers' most important economic rivals, the nation's railroads.

The history of mileage taxes and their enforcement is a catalog of problems:

These taxes are usually geared to the weight of a vehicle, whereas highway engineers have long agreed that road damage—to the extent caused by vehicle traffic—varies not with a vehicle's weight but with the weight its axles carry. For this reason, a 60,000-pound, three-axle dump truck will cause greater wear on the road than an 80,000 pound, five-axle tractor-semitrailer.

Most mileage taxes take no account of the actual weight of a vehicle, but only of its maximum registered gross weight, lessening still further the correlation between the amount a vehicle used the roads and the amount of tax it pays.

Nearly all mileage taxes are riddled with exemptions for trucks connected with the states' local industries. With these vehicles paying no tax, or paying at a reduced rate, the major burden of paying for the maintenance of the roads settles more heavily on out-of-state carriers.

Mileage taxes are the most expensive of taxes to administer. Because mileage taxes are vehicle-specific, their administration requires the state and the taxpayer to keep records and report information on individual vehicles. The ratio of administrative expense to collection from mileage taxes is a much-argued subject but appears to range from 5 percent, in itself a high figure, to 30 percent or more.

Mileage taxes are subject to evasion. Intrastate carriers are not required to keep mileage records. Interstate carriers are required to keep extensive records. Therefore, states imposing mileage taxes concentrate enforcement on interstate carriers and leave the rest of the industry on the honor system.

Enforcement methods actually employed by states strongly tend to increase the discrimination against interstate carriers. Most of the mileage tax states maintain systems of ports of entry as their primary enforcement mechanism. Mileage tax states have not been able to solve the problem of tracking intrastate vehicles. The only state which has tried, Oregon, has over 60 internal ports and is still unable to track all intrastate movements.

Clearly we are not suggesting that the states stop collecting highway taxes. Only that their means of doing so be restricted to the two forms of taxation that have proven over long years of experience to be both equitable and efficient: vehicle registration fees apportioned to the use of a state's roads, and fuel use taxes similarly apportioned. This is far from a revolutionary proposal. It is well to remember that the vast majority of states already live in prosper by these standards. In addition it is these two forms of taxation that have been expressly endorsed by the United States Supreme Court as constitutional in the landmark case of *American Trucking Associations* v. *Scheiner*.

State Indicia for Trucks

We also strongly recommend the elimination of state truck-identification requirements. Over the past few years, since the motor carrier industry was largely deregulated at the federal level, the states have imposed on the industry a large number of regulations which require all manner of decals, indicia, and numbers to be displayed on the doors, sides, fronts, and even the windshield of trucks. These requirements have largely been imposed in the name of tax enforcement. None is justified.

All these requirements are inordinately expensive for truckers to comply with. Imagine the difficulties and cost involved in distributing among a fleet of 300 to a thousand trucks, located all over the country, the two or three dozen stickers each must display in order to operate. These stickers have different renewal dates; they often fade or fall off a truck; when a door or windshield is replaced they must be repurchased; they complicate the transfer of an old vehicle or the entry into the fleet of a new one; and the required placement of some on the vehicle windshield may unsafely impede a driver's view.

Indicia have also been used as the excuse for the imposition of flat taxes and "administrative fees" which discriminate against interstate commerce. Such flat fees were specifically outlawed by the U.S. Supreme Court last year in its landmark decision in *American Trucking Associations* v. *Scheiner*. In that case the Court held that a $36 per axle tax was unconstitutional because it was not subject to apportionment or reciprocity and therefore discriminated against interstate commerce. Subsequent litigation by ATA in various state courts has resulted in other flat fees being declared unconstitutional. Yet these flat taxes persist in a number of forms in dozens of states and are no less burdensome for having been explicitly recognized as unconstitutional. The collective burden of these per vehicle flat fees remains large. The trucking industry is being forced by these states to pay to to litigate—either way the industry pays. The industry simply cannot afford to litigate in every state which continues to impose unapportioned flat fees.

Collectively, these state indicia interfere with, rather than enhance, the identification of a vehicle, because they obscure the visibility of the federal ICC number and of the new DOT numbers which federal law, on the grounds of safety, requires interstate vehicles to display.

Vehicle identification (with IRP license plates as the one exception) should be considered an area where federal regulation already preempts the states. We believe that Congress has already authorized the Department of Transportation to restrict state requirements with respect to vehicle identification and therefore we urge Congress to require the Department to begin a rulemaking on this matter. Current congressional authorizations do not address "exempt" carriers. We also urge that Congress enact legislation bringing exempt carriers under the same DOT identification requirement covering other carriers.

Therefore we request Congress to establish the following two standards with regard to state operating taxes:

(1) State and local highway taxes on interstate motor carriers should be limited to: (a) vehicle registration fees apportioned and administered under the terms of the International Registration Plan; and (b) fuel taxes apportioned and administered under the terms of the International Fuel Tax Agreement.

(2) State and local indicia and identification markers on highway vehicles engaged in interstate commerce should be limited to the license plate issued under the terms of the International Registration Plan.

The sooner these standards are in place, the sooner all parties will benefit from such an adjustment in state taxing methods: motor carriers from the elimination of discriminatory taxes and the reduction in the enormous administrative expenses they incur just to pay them; the states from reduced administrative expenses and a great improvement in the effectiveness of their highway revenue collection process; and the nation as a whole, whose transportation system would henceforth operate more freely.

GENERAL BUSINESS TAXES

General business taxes are more familiar than highway taxes. They are the income, sales, and property taxes that all businesses and most private individuals pay.

In most states, interstate motor carriers are subject to these state and local general business taxes. It is a rare tax that does not have some problems, and carriers have had some difficulties with sales and property taxes. However, these pale in comparison to recent problems involving income or corporation taxes.

State Income Taxes

In the not too distant past, states levied their corporation taxes (which also may be called net income, franchise, gross receipts, or single business taxes) on businesses based within their borders, and not on interstate commerce.

Over the last decade or so, however, since the 1977 decision of the Supreme Court in *Complete Auto Transport* v. *Brady*, interstate commerce has become a legitimate target of state taxation, provided a taxing jurisdiction follows a few simple rules

laid down by the Court. In response, more and more states are seeking to levy their income taxes on interstate trucking companies and even on interstate truck drivers.

Unfortunately, it is becoming common for a state to "reinterpret" its tax law (without changing a word of it) and declare that all truckers who travel on its roads—whether or not they even stop in the state—are henceforward taxable—and in fact always were taxable, and must now pay four, six, ten, even fifteen years of back taxes, plus interest, plus a penalty for not having filed before! These activities are taking place in jurisdictions in which the carrier, under any reasonable standard, has never done any business!

There is not a shadow of doubt that a carrier that uses a state's roads is liable to pay that state's highway taxes. And carriers do pay highway taxes in every state through which they travel. But, where the carrier's only substantial contact with a state is the use of its roads, for which the carrier already pays highway taxes, it is not right that the state should also require the motor carrier to pay an additional general business tax because of the very same use of the roads. At least twelve states have been guilty of over-reaching in this manner, by claiming that mere travel within their borders is sufficient to render an out-of-state motor carrier a target for income taxation.

Further, more and more states, that never before claimed that interstate motor carriers owed them an income tax, and that never made any attempt to inform carriers of their potential liability, are now assessing years of retroactive taxes. At this time the state of Michigan is attempting to assess carriers for six years of retroactive taxes, plus penalty and interest, without ever having made any previous effort to apply its Single Business Tax to interstate carriers or to notify them of their obligations under the tax.

This practice of retroactive assessments is in itself strikingly unfair, and warrants Congressional action. But additional problems arise when the states seek to levy even current income taxes on an industry as essentially interstate—as national—as interstate trucking.

First, there is the problem of apportioning to a state its fair share of a carrier's income. Only that part of income that may be deemed to have been earned within a state can be claimed as an object for its tax. Each state may use its own unique apportionment formula with the result that many overlap. Frequently, a carrier that is taxable in more than 25 or 30 states will be taxed on more than 100 percent of its taxable income.

Second, while apportionment may reduce a carrier's actual tax liability in any one state to a manageable sum, the cumulative burden of complying with more than a few highly technical and exceedingly varied state tax laws will prove overwhelming to all but the largest corporations. Most states base their income taxes on the federal corporate income tax but add myriads of their own individual variations. Even the simplest state return means a tax preparer's fee in the hundreds or thousands of dollars for the small businessman who happens to be an interstate trucker. Multiply that fee times the number of states in which that carrier operates, and you begin to see the real problems—the real dollar cost—for the nation's transportation system that these taxes will cause and are causing.

Third, a few states are beginning to claim not only income taxes from the trucking companies that cross their borders, but also personal income taxes from the drivers of the trucks. A truck driver from Nebraska, for example, who drives to Washington, DC, could conceivably be subjected to income taxes in five or six states, without ever having left the cab of his truck! (Federal law already restricts the states from requiring income tax withholding from transportation employees, but those employees may still be assessed the tax.) In 1980 Congress granted airline employees an exemption from this type of state taxation in P.L. 96-193, codified at 49 U.S.C. 1512. This provision preempts state taxation of interstate airline employees except: (1) by their state of residence, or (2) the state in which more than half their compensation (measured by flight time) is earned.

Finally, some states permit their local governments to levy general business taxes. More and more, these localities are beginning to assess interstate motor carriers for these taxes, even though these carriers have no more than, literally, a passing connection with such places. With more than 60,000 communities in the United States, the potential problems with local business taxes are a very real nightmare for the trucking industry.

The problems with general business taxes affect all interstate carriers. However, these taxes are particularly problematic for carriers which travel irregular routes throughout all 48 continental states; for example household goods movers are among the most severely impacted. The American Movers Conference will be filing

separate comments detailing the concerns of their members, many of whom operate small businesses.

Congress has already recognized the problem inherent in state and local taxation of other transportation modes and has given both the railroads and the airlines broad relief from burdensome and discriminatory state and local taxation (see 49 USC 11503 and 1513).

Some Solutions

We would offer for your consideration some suggestions for dealing with these problems:

(1) A state should be prohibited from levying a general business tax, by whatever name called on an interstate motor carrier that does not do a substantial amount of business within its borders. Regular pickups or deliveries, for example, or the maintenance of a permanent staff or active terminal or warehousing facilities in the state would confer taxable status; mere travel in the state would not.

(2) Smaller interstate carriers, those with annual gross receipts under $30 million, should be subject to an income tax only in their state of domicile or in the state in which the major part of their operations are conducted.

(3) States should be prohibited from collectively taxing a carrier on more than 100% of its income.

(4) Transportation employees of a motor carrier engaged in interstate commerce should be subject to income taxation only in the employee's state of residence.

(5) Local governments should be prevented from taxing interstate motor carriers which do not maintain a permanent staff or substantial property within the locality.

We submit everyone would gain by the implementation of these suggestions. The states would forgo only a negligible amount of revenue while they would save the substantial cost of imposing these complicated taxes on large numbers of very small taxpayers. The trucking industry, particularly its smaller members, would benefit enormously. On a national basis it would give interstate trucking equity with other modes. And finally the nation as a whole would benefit from these rational adjustments to the federal system.

OTHER ISSUES

Access to Federal Courts

During the past seven years, the interstate motor carrier industry has been continuously in state courts of law, challenging one discriminatory state tax after another. These cases have been lengthy, difficult, and very expensive.

Last year, the U.S. Supreme Court, in the *Scheiner* decision referred to earlier, seemed to have settled the issue of flat taxes on interstate carriers once and for all: such taxes are, the Court said, unconstitutional. The justice of the industry's long years of legal efforts seemed to have been confirmed.

Yet today some twenty states, including several with which the industry has been in court now for many years, still impose these very same flat taxes on the vehicles of interstate carriers. And, as related in the preceding pages, these and many other states levy many other forms of discriminatory and burdensome taxes on the interstate motor carrier industry.

To be sure, the actions we are today requesting Congress to take will serve to alleviate these very substantial distortions in the nation's transportation system. But if the industry has to go to every state court system in the country for the relief it—and the nation's economy—desperately needs and fully deserves, it won't get it! Not only is such legal action time-consuming and prohibitively expensive, it is often unsuccessful. The industry has found that too often state courts, reflecting the jurisdictions' parochial financial interests, view interstate carriers as outsiders and rule against them. Therefore, to ensure that these and other federal remedies can be effective, we ask that their enforcement be permitted through the federal court system.

As a matter of intermodal equity, such a move is, in fact, ten years overdue. In 1978, in the Railroad Revitalization and Regulatory Reform Act (the 4R Act—P.L. 95-473), railroads were given relief from all types of discriminatory state taxes, and were in addition granted access to the federal District Courts to seek injunctive and other relief against state levies violative of the new federal mandate. (The provisions have been codified at 49 USC 11503).

It was feared by some that these laws would serve only to clog the federal court system with recondite issues of state taxation. That has not proven to be the case. Federal courts have sucessfully handled the cases which have arisen under the 4R

Act without having to neglect their other business; and the results have been of very considerable benefit to the nation's railroads—and thus to the nation itself.

The establishment of a similar system of relief for motor carriers burdened by harmful and illegal state taxes would also be of benefit not only to the industry affected, but also to the continuing struggle to maintain the global competitiveness of the U.S. economy. (Motor carriers were given protection from discriminatory state *property* taxes as well as access to the federal courts to enforce this provision in 49 USC 11503a. However, this section is insufficient to protect motor carriers from the many other types of discriminatory state taxes described earlier.)

And, once again, no one would lose by this step. All, even the states most directly affected, would gain by the smooth institution in this country of a truly equitable state tax treatment of interstate motor carriers.

Conclusion

State governments have been referred to as a great experimental laboratory for the nation, where many ideas, good and bad, all get their respective day in the sun. but sooner or later, at least with respect to an industry as vital to the nation's domestic welfare and competitive position in the world as is interstate transportation, there comes a time to end the experimentation and choose the methods that have proven themselves to be the best.

We are not seeking to limit the ability of states to raise the revenues they need, but we are seeking a state tax system that is equitable in law and in practice and efficient in administration.

To that end we recommend that Congress:

Operating Taxes

Limit state and local highway taxation to registration fees and fuel taxes implemented through IRP and IFTA.

Limit state and local imposed indicia requirements to the vehicle license plate.

Require DOT identification numbers of exempt carriers.

General Business Taxes

Prohibit states from imposing general business taxes on motor carriers which have no substantial business contact with the state.

Prohibit states from imposing income taxes on small carriers, except in the state of domicile or in the state in which the major part of their operations are conducted.

Prohibit states from cumulatively taxing a motor carrier on more than 100 percent of its income.

Prohibit states from taxing the income of interstate truck drivers, except through taxes levied by the driver's state of residence.

Prohibit local governments from taxing interstate motor carriers which do not maintain a permanent staff or substantial property within the locality.

Other

Authorize the enforcement of these federal standards and other federal remedies through the federal court system.

None of these actions will limit the ability of state governments to raise needed revenue. All will make for better tax administration and good government. All of these actions eliminate unreasonable and unconstitutional burdens on interstate commerce. All will ultimately make the trucking industry more productive and our shippers more competitive in a global economy.

QUESTIONS OF SENATOR EXON AND THE ANSWERS THERETO

1. Current federal law treats the various transportation modes differently with regard to the issue of discriminatory or burdensome State taxation. The rail industry has the broadest relief, the motor carrier industry has somewhat less, and the airlines have even less since they do not have a grant of Federal court jurisdiction. The pipeline and waterway industries have no statutory authority at all. Is there a rationale for these differences in treatment?

There appears to be no rationale, no logical reason, for these differences in treatment, although there may be explanations for them, both historical and political.

Interstate commerce, in the old metaphor, is the very blood of the American economy. Whatever impedes or lessens its flow reduces America's economic performance in the global competition just as surely as a circulatory problem hampers an Olympic athlete.

What startles the mind in the present disparate treatment of transportation modes is that while the railroad industry has substantially complete protection against state taxes that discriminate against or unduly burden it, the Nation's largest and most important transportation mode, interstate trucking, has no comparable Federal relief. Few would argue that a billion dollars annually just in compliance costs for motor carriers, in addition to taxes that discriminate against trucking, are not injurious to interstate commerce; but those who would give relief to the rails and deny it to trucks say that without relief the weakened railroad industry would die altogether.

Are motor carriers, then, to labor under state-imposed discrimination and administrative costs greater than ever the railroads faced until they too are so weakened that they must die without relief? Are the states, in the name of a misguided federalism, to be permitted to torment this essentially interstate industry until its usefulness to the Nation has been severely damaged? The American economy cannot afford it.

2. Each of the industries whose representatives testified at the hearing would like statutory authority to challenge State and local taxes at least as broad as the rail industry. How would you assess the cumulative effect on State revenues if all of your industries, as well as other interstate industries such as electric utilities and telecommunications, were granted similar relief?

The cumulative, long-term effect on State revenues of the changes you describe would be negligible.

The right of the States to have secure and sufficient sources of revenue is undeniable. We are not asking here for exemption from state taxation. The trucking industry stands ready to pay its fair share of state taxes, through both user levies for

highway maintenance and repair and through general business taxes to fund other state services. While I cannot speak for other interstate businesses, I presume their views are much the same.

What we ask is relief from such features of the current system of state taxation as discriminate against interstate commerce or burden it through the imposition of unnecessarily high compliance costs. Should such relief be granted us, there is no doubt that in the short term, some state revenues might be lost, before state systems of taxation could be readjusted to restore a balance.

However, in the long run (and I speak in terms of at most a few years) state revenues would be fully restored, since the relief we seek would not deny to a state any efficient, nondiscriminatory form of taxation it might care to impose.

More to the point, perhaps, not only would the flow of interstate commerce benefit immediately from Federal relief, the Nation's economy, and the economy of every State, would benefit accordingly.

3. How would you assess the overall effectiveness of existing stautory authority that seeks to eliminate burdensome or discriminatory taxaton of motor carriers? What has been the history of challenges brought under this statute?

The present Federal protection afforded motor carriers is wholly inadequate for the needs of this industry.

The current statutory authority permits motor carriers to challenge only discriminatory property taxes. This is merely the restatement (and not in full) of the relief granted the railroads in the 4R Act. Railroads, with their very extensive holdings of land-grant real property, were traditionally subject to discriminatory levies on such property. Freedom from these burdens was a substantial relief for that industry.

Motor carriers, on the other hand, ordinarily hold relatively very little in the way of real property. Motor carriers do not own their rights of way, although they pay for a very substantial share of them through operating taxes; trucking is a labor-intensive rather than a capital-intensive business. Protection fashioned for the benefit of the railroads has not been of much help to us.

In fact, to our knowledge only three challenges to state property taxes have been brought by motor carriers under the current Federal statute. Compared to the very broad range of discriminatory state taxes on trucking and the very heavy burden of compliance costs borne by truckers, the current system provides scarcely any relief at all.

Besides all this, interstate motor carriers today face a much more substantial battery of state taxes than they did even in 1980, when the current Federal "relief" was granted us. Decisions of the United States Supreme Court have thrown open the area of interstate commerce for the imposition of state taxes, the last eight years have seen the repeal of much state aid from the Federal level, and deregulation of the trucking industry has greatly increased the numbers of interstate truckers, making them a more tempting target for state levies.

4. Do you believe that the motor carrier industry faces discriminatory taxation unique from other transportation industries?

There is no question that interstate motor carriers face forms of discriminatory state taxation which are unique to our industry. In addition, the discrimination we face tends to be more burdensome, due to the nature of interstate trucking and of those who engage in it.

A glance at our written testimony for the September 16 hearing will reveal our concern over discriminatory and burdensome state operating taxes. These are taxes levied solely on interstate motor carriers, by virtue of their use of the highways. No other transportation mode pays these taxes, which nevertheless comprise a very large fraction of a trucker's total state and local tax liability. Here is one area in which the discrimination against motor carriers may be said to be unique.

A second kind of discrimination arises out of the fact that, unlike the other modes of interstate transportation, interstate motor carriers have wholly intrastate competitors in every jurisdiction. A number of ATA's recent successful court challenges have been to state operating taxes, including the flat taxes ruled unconstitutional by the U.S. Supreme Court last year, and state general business taxes, that discriminate against out-of-state motor carriers in favor of their in-state counterparts. These are in fact just the sort of discriminatory impositions that led the Founding Fathers to include the Commerce Clause in the Constitution in the first place.

Third, owing again to the fact that trucking is labor-intensive rather than capital intensive, as are the other modes, the vast majority of motor carriers are small businessmen, often sole proprietors. The damage to the Nation's economy wrought by discriminatory state taxes is insidious--hard to envision--although it is no less real for that. Even the damage suffered by a large corporation--a railroad, say, or a large pipeline--while it may be crippling to the business, is somehow impersonal. But there is no mistaking the weight of the burden placed on a family business by the myriad of wasteful, duplicative, and often senseless state tax rules, as well as the discrimination inherent in many of the taxes themselves: it is a crushing and nightmarish load to carry.

Senator EXON. Thank you, Mr. Donohue.

I am pleased now to turn to Mr. James Landry, the General Counsel for the Air Transport Association. Mr. Landry, welcome.

STATEMENT OF JAMES E. LANDRY, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, AIR TRANSPORT ASSOCIATION OF AMERICA, ACCOMPANIED BY DAVID WEST, DIRECTOR OF TAXATION

Mr. LANDRY. Thank you, Mr. Chairman, Senator Breaux. My name is Jim Landry and I am Senior Vice President and General

Counsel of the Air Transport Association of America. I am accompanied here this morning by David West, our Director of Taxation. We welcome the opportunity to discuss those provisions of the Federal Aviation Act designed to protect the airlines from discriminatory state taxes.

In my prepared statement I described the background and the intent of Congress in enacting section 532 of TEFRA which amended section 1113(b) of the Federal Aviation Act of 1958 by prohibiting the states from assessing, levying or collecting a tax on air carrier transportation property in a manner different from that applied to other commercial and industrial property in the same jurisdiction.

Section 1113 itself was originally added to the Federal Aviation Act in 1973 in order to prohibit state and local governments from taxing the revenue from sales of air transportation by preempting this source of revenue. You may recall that this provision abolished local head taxes on airline passengers.

Although the intent of Congress to preempt the right to tax the revenue from sales of air transportation was clear, substantial litigation, including a U.S. Supreme Court decision, has been required to free airlines from continued efforts by the states to tax sales of air transportation. I might add that we are now gearing up to challenge a new apportioned gross receipts tax imposed in the Commonwealth of Puerto Rico, so the end is not yet in sight.

The section 532 language of TEFRA was modeled on similar provisions contained in the 4-R Act and the Motor Carrier Act of 1980. However, the language of section 532 is not identical to those provisions. Under the 4-R Act and the Motor Carrier Act, U.S. district courts have jurisdiction to resolve problems arising under that anti-discrimination law, whereas section 532 contains no such provision.

In addition, the 4-R Act contains a catch-all provision prohibiting any other tax that discriminates against a rail carrier, as Mr. Briggs described. Section 532 has no catch-all provision.

Both are omissions which, as I point out in our prepared statement, should be remedied. Because of those omissions, section 532 has not met with the success that was intended. Discriminatory state taxes against airlines still exist. In several instances, the states continue to circumvent section 532's clear intent, principally by relying on its in lieu provision.

In my prepared statement I also note the relative lack of success experienced by the airlines in cases where discrimination exists in the assessment methodology employed by the assessing agencies. In simple terms that is born of a failure by state agencies and courts to recognize that we should now be assessed by the same standards as other industrial or commercial businesses in the same jurisdiction, rather than as an entity enjoying an automatic pass-through with a guaranteed rate of return under the intense Civil Aeronautics Board regulation which existed up until 1978.

Lastly, my statement calls to your attention one other recent and very disturbing development, the enactment of new local sales or excise taxes on commercial aviation fuel. The growing trend is to divert the new fuel tax revenues from the airport and use it for other non-aviation purposes. Recent examples include new 5 cent

per gallon taxes at Boston's Logan Airport and Chicago's O'Hare with the revenue being earmarked for non-airport aviation uses in each case. The airlines have had little success to date in protecting themselves from these discriminatory fuel tax developments.

In conclusion, based upon our experience to date, the airlines urge that the provisions of Federal Aviation Act section 1113 be retained and further strengthened by giving airlines access to the Federal courts in cases of discriminatory state and local taxes.

We also urge that a catch-all provision, similar to the one which protects railroads, be added to section 1113 to blunt the growing trend toward discriminatory taxes on commercial aviation fuel.

Thank you, Mr. Chairman.

[The statement and questions and answers follow:]

STATEMENT OF JAMES E. LANDRY, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, AIR TRANSPORT ASSOCIATION OF AMERICA

Mr. Chairman, members of the Committee, my name is James E. Landry and I am Senior Vice President and General Counsel of Air Transport Association of America (ATA). I am accompanied by David West, ATA's Director of Taxation. ATA is a trade and service organization whose airline members provide over ninety percent of the scheduled passenger service and most of the cargo service available in the United States. We welcome the opportunity to discuss those provisions of the Federal Aviation Act designed to protect the airlines from discriminatory state taxes.

By way of background, in 1982 Congress passed legislation designed to prohibit the States from taxing airline property in a discriminatory manner. The provision was enacted as section 532 in Title II of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"). It amended section 1113(b) of the Federal Aviation Act of 1958 (49 U.S.C. § 1513(b)) by prohibiting the states from assessing, levying or collecting a tax on air carrier transportation property in a manner different from that applied to other commercial and industrial property in the same jurisdiction.

Section 1113 was originally added to the Federal Aviation Act when the Congress enacted the Airport Development Acceleration Act of 1973, Public Law 93-44. The original purpose of section 1113 was to prohibit state and local governments from taxing the revenue from sales of air transportation by preempting this source of revenue. You may recall that this provision abolished local head taxes on airline passengers. Although the intent of Congress to preempt the right to tax the revenue from sales of air transportation was clear, substantial litigation including a U.S. Supreme Court decision has been required to free airlines from continued efforts by the states to tax sales of air transportation.

The section 532 language of TEFRA was modeled on similar provisions contained in the Railroad Revitalization and Regulatory Reform Act of 1976 (49 U.S.C. § 11503) and the Motor Carrier Act of 1980 (49 U.S.C. § 11503(a)). However, the language of section 532 is not identical to those provisions. Under the 4R Act and the Motor Carrier Act, U.S. district courts have jurisdiction to resolve problems arising under the anti-discrimination law, whereas section 532 contains no such provision. In addition, the 4R Act contains a "catch-all" provision prohibiting "any other tax that discriminates against a rail carrier." Section 532 has no "catch-all" provision, but it does state that the section "shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes." This provision was inserted to ally concerns that section 532 would invalidate the Minnesota property tax on airline flight property.

Section 532 has not met with the success that was intended. Discriminatory state taxes against airlines still exist. In several instances the States continue to circumvent section 532's clear intent, principally by relying on the "in lieu" provision.

In other instances state and local assessing agencies follow more rigid "market value" standards or use complicated public utility "unit assessment" techniques when assessing airline property, particularly airline airplanes. These assessment procedures which establish airline values much closer to the current fair market value, are not followed when valuing most other industrial or commercial property and thus discriminate against the airlines. As a result airlines are required to pay a higher level of property tax than that collected from other industrial or commercial businesses in the same jurisdiction.

Also there is a continuing trend by local jurisdictions to exempt classes of property. Business inventories are an example of this type of exempt property. From an airline point of view this should be corrected by requiring the states to extend equal treatment to airline property either through exemption or by requiring that the same assessment standards or techniques apply to all property. Furthermore, experience has taught us that having airline cases heard in state courts is more time-consuming and much more complicated because of numerous state court procedures as opposed to a more efficient streamline procedures applicable in federal court.

Relief has been forthcoming in those instances where statutory discrimination in the form of equalization percentages existed, i.e. airline property being equalized at a higher percentage than commercial and industrial property is equalized. However, the airlines have not enjoyed the same degree of success in other property tax discrimination cases as they have in those cases which involved efforts to tax the revenue from sales of air transportation. Nor have they enjoyed the degree of success to date that the railroads have achieved in those cases where discrimination exists in the assessment methodology employed by the assessing agency.

As mentioned earlier the provisions of FAA Section 1113 do not provide airline access to the federal court system. To date, it has been impossible for the airlines to carry the burden of proof in state courts where such discrimination exists. One needs only to look at the problems of proof in similar cases faced by the railroads in federal courts to appreciate the impossible task faced by the airlines in a state court system where the natural inclination is to protect the "revenue".

One other recent and very disturbing development has been the enactment of new sales or exise taxes on commercial aviation fuel. The growing trend is to divert the new fuel tax revenues from the airport and use it for other non-aviation purposes. Recent examples include new five cent per gallon taxes at Boston's Logan Airport and Chicago's O'Hare with the revenue being earmarked for non-airport/aviation uses in each case. The airlines have had little success to date in protecting themselves from these discriminatory fuel tax developments.

Based upon experience to date, the airlines urge that the provisions of FAA section 1113 be retained and furher strengthened by giving airlines access to the federal courts in cases of discriminatory state and local taxes. The airlines also urge that a "catch all" provision similar to the one which protects railroads be added to section 1113 to blunt the growing trend toward discriminatory taxes on commercial aviation fuel.

QUESTIONS OF SENATOR EXON AND THE ANSWERS THERETO

Question 1. Current Federal law treats the various transportation modes differently with regard to the issue of discriminatory or burdensome State taxation. The rail industry has the broadest relief, the motor carrier industry has somewhat less, and the airlines have even less since they do not have a grant of Federal court jurisdiction. The pipeline and waterway industries have no statutory authority at all. Is there a rationale for these differences in treatment?

Answer. The first question points out that current federal law treats the various modes of transportation differently with regard to the issue of discrimination or burdensome state taxation and inquires whether there is a rationale for these differences. In the view of the airline industry, the answer is, most emphatically, no. While there may have been justification in theory when the airlines enjoyed a virtually guaranteed rate of return, which contemplated the passing through of such costs to the consumers in the rate base approved by the Civil Aeronautics Board, no such justification exists in the era of airline deregulation.

Question 2. Each of the industries whose representatives testified at the hearing would like statutory authority to challenge State and local taxes at least as broad as the rail industry. How would you assess the cumulative effect on State revenues if all of your industries, as well as other interstate industries such as electric utilities and telecommunications, were granted similar relief?

Answer. Secondly, you ask if we would comment on the impact on state revenues if other transportation modes were to be granted the same authority to challenge state and local taxes as is now granted to the railroads. In this regard, two developments since the airlines were deregulated in 1978 are noteworthy.

First, there has been an increase in instances where airlines have been the target of new fuel taxes at the state and local level. Second, the railroads have been successful in challenging similar taxes aimed at them. We have no data which would enable us to quantify the cumulative effect of these situations on state revenues.

However, if all the interstate transportation modes were granted the statutory authority to challenge discriminatory state taxation, we do submit that the state taxing authorities would no longer be able to shift a disproportionate tax burden to any individual mode. In that case, they would instead have to institute a fair, evenly distributed taxing scheme that would not discriminate against some industries while favoring others.

Question 3. The statute prohibiting discriminatory taxation of airline property does not authorize Federal courts to enjoin State taxes as is permitted under the railroad and motor carrier statutes. What effect has this had, if any, on your industry's experiences with the anti-discrimination provisions adopted in 1982?

Answer. In answer to your third question, we believe that the airlines have been required to devote an inordinate amount of resources to protesting state and local taxes in state courts, due to the fact that airlines do not have access to Federal District Courts. Two short examples demonstrate this.

First, the difficulty airlines experience in protesting discriminatory property taxes can be demonstrated by the results in the South Dakota Case *(Western Airlines, Inc.* v. *South Dakota Board of Equalization,* No. 85-732). In the course of this challenge, it was necessary for five airlines to pay taxes under protest in eight different counties and to bring appeals to the State Board of Equalization. Forty-two cases in all were then consolidated by stipulation and order of the trial court before the issue of discrimination could even be raised and argued, on appeal. This case spanned five years before a decision was finally entered by the U.S. Supreme Court in February, 1987.

Second, airline experience with prohibited state taxes on sales of air transportation is no better. After the landmark Hawaii Case (*Aloha Airlines, Inc.* v. *Director of Taxation, State of Hawaii,* No. 82-585), in which the airlines successfully challenged the Hawaii state tax by proving that it was indeed a tax on air transportation that is prohibited by the federal statute, it was still necessary to re-litigate the issue in Florida when that state imposed a service tax on the charge for the air transportation of property. And now, as I mentioned in my testimony, the airlines are getting ready to fight a new effort by the Commonwealth of Puerto Rico to tax revenues from air transportation.

It is the airlines' view that most of these prolonged and duplicative efforts would be unnecessary if the airlines had access to federal court jurisdiction, as do the railroads. If they did, it would only be necessary to file for an injunction in federal court, alleging that the state tax in question was violative of the federal statute prohibiting discriminatory state taxation of air transportation.

Currently, lacking that immediate access to federal court jurisdiction, the airlines must first proceed through the state administrative taxation hearings, then go on to state court proceedings, and finally make an appeal to the U.S. Supreme court in order to resolve the issue of whether the state tax in question violates federal law. Clearly, if we could raise that question at the outset, in federal court, the process would be more efficient and would result in a timely adjudication of the issue.

Thus, we would recommend that if the Senate were to contemplate making any legislative changes to the statute that now governs the state taxation of air transportation, a prime objective would be to gain access to the Federal Court system in which to litigate our claims that the state tax laws were in violation of federal statute.

Senator EXON. Thank you, Mr. Landry.

Jerry Verkler, the Senior Vice President for Government Affairs, Interstate Natural Gas Association. Welcome to you, Mr. Verkler.

STATEMENT OF JERRY T. VERKLER, SENIOR VICE PRESIDENT, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA.

Mr. VERKLER. Thank you, Senator.

Senator, I have filed my formal statement, and like a candidate once for the U.S. Senate from my home state, after reading a long speech, threw it down and said, "Now I would like to give you my own views."

I listened with interest to Mr. Berg as he brought up a bill that my industry is supporting and supporting very strongly over in the other body, H.R. 2953. I was somewhat surprised to hear this repre-

sentative of the agricultural community attack legislation that we feel is very important and is needed.

I am sure that he or his predecessors in your own state of Nebraska never protested legislation that was passed granting tax exemptions for the agricultural people. Incidentally it was passed over the veto of a very wise Governor I might add. But once you start down this path of discrimination, it leads to all kinds of problems.

And, Senator, as we all know in this room, this isn't a new problem. In 1961 I had an office two floors down in this building when the so-called Doyle Report, a very comprehensive report on interstate transportation, was submitted to this committee. In that report they talked about discriminatory taxes on interstate commerce. The two industries that were hit the most and the hardest were the railroads and the pipelines.

Now, the railroads were able to secure legislation, and we also are trying very hard to end the discrimination that affects our pipeline industry. It is almost like the cat that had the love affair with the skunk. We don't know if we have had all we wanted, but we have had about all we can stand.

There are three main points that I want to make to you, and with all due respect to Commissioner Heitkamp whose state, incidentally, is not on our list of those who discriminate. There are only about 11 that we found, and we are constantly reviewing the list. But to successfully argue in the state systems where this discrimination takes place is almost like getting a brave chicken to go over to the fox' den and try to argue its case. We believe that this is really an interstate matter, and the Federal court system is where we should argue our case, just as the rail companies have been able to do.

But the real impact is not on those citizens in the states where the discrimination occurs. In our industry it occurs at the other end of the system where consumers in states thousands of miles away must pay for the discrimination assessed against the pipelines along the system.

We are not seeking interference in state taxing prerogatives. All we are saying is if you are going to tax us, fine, but do not discriminate against us! We are ready to pay our taxes. We always have and we certainly always will. But we are steadfastly opposed to the discrimination that exists in some of these states, discrimination which must, as I had mentioned before, under the rules of the regulatory system under which we operate, be passed on to the ultimate consumer. He pays the tab and we do not believe—and neither does he—that it is really fair. So, that is what we are asking for. We are asking to correct this inequity which exists in a few states.

Other industries at this table were able to successfully achieve the right to go to Federal courts, although some felt that they have been deprived of one of the key provisions, and we do too. We feel that this measure which has been brought up, H.R. 2953, is absolutely essential to assure fairness. And again, we are not trying to avoid any taxes, but we are trying to avoid discrimination.

Thank you, Mr. Chairman.

[The statement and questions and answers follow:]

STATEMENT OF JERRY T. VERKLER, SENIOR VICE PRESIDENT, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

I am Jerry T. Verkler, Senior Vice President of the Interstate Natural Gas Association of American (INGAA). INGAA is a non-profit national trade association representing virtually all of the major interstate natural gas pipelines in the United States. Our member companies move natural gas from producing areas to distributors who, in turn, delivery the gas to the ultimate consumer. Approximately 90 percent of the natural gas transported and sold annually in interstate commerce flows through the more than 200,000 miles of pipeline owned and operated by INGAA's member companies.

INGAA's member companies overwhelmingly support legislation dealing with the long-standing problem of discriminatory taxes on interstate carriers applied by some states and local taxing jurisdictions. Quite simply, some jurisdictions take advantage of interstate pipelines to impose a disproportionate property tax burden, knowing that customers of the pipelines, many of whom are located in other states, will have to bear the cost.

This discriminatory practice has been applied to other modes of transportation in the past, but Congress has seen fit to correct the problem by declaring such acts to constitute an unreasonable discrimination against interstate commerce and granting federal courts jurisdiction to review such cases. The interstate natural gas pipeline industry is presently seeking legislation that would provide it with the same protections that other industries have received from Congress.

The Subcommittee on Monopolies and Commercial Law of the House Judiciary committee recently reported favorably H.R. 2953, a bill which would accomplish this. Introduced in the summer of 1987, H.R. 2953 currently has the bipartisan support of 43 co-sponsors.

I would emphasize only three points concerning the position of the natural gas pipeline industry with respect to this legislation. First, our industry is not seeking federal interference in state taxing prerogatives. We are simply asking that discrimination against interstate commerce not be condoned. Second, what we are proposing is merely an extension of a well established federal policy. It should not require lengthy review because it does not presuppose that any ad valorem tax is discriminatory; pipelines would still have to prove that to the satisfaction of the court. Finally, because pipeline rates are regulated by the federal government and tax payments are a part of an interstate pipeline's cost of service, the discriminatory tax burden is passed directly on to the ultimate consumers of the natural gas. In the final analysis, it is the gas consumers who bear the burden of discriminatory tax practices and it is the consumers who would benefit from the correction of this inequity.

Federal legislation is necessary to correct the pattern of discriminatory property tax practices which exists on interstate natural gas pipelines today. While the bottom line for these discriminatory practices is higher prices for gas consumers, the practices themselves vary from state to state. While most state constitutions require that property be valued equally and uniformly on the basis of fair market value, in reality this seldom happens. First, assessments of pipelines tend to be updated more often than for other types of property, thus resulting in higher assessments so long as property values are rising. When an honest attempt is made to correct the widening difference in assessments due to this de facto discrimination, the results are usually politically unpopular.

The temptation is then for local officials to find a way to legalize the past inequitable practices. This often results in de jure discrimination, when gas pipeline properties are taxed at a higher rate.

Let me cite two examples of the discriminatory practices interstate pipelines encounter. In Louisiana, whose form of classification is de jure, our type of property is assessed at 25 percent of fair market value, which amounted to $42.3 million in taxes at the end of 1986. In contrast, other commercial and industrial property in Louisiana is assessed at a 15 percent level, which if applied to our properties would produce a tax of $25.4 million. In Oklahoma, whose form of discrimination is de facto, the gas industry paid $7.9 million in excess property taxes during the same year. Studies made by INGAA indicate that the extra taxes paid by interstate pipelines in 11 states with discriminatory practices totaled approximately $70 million in 1986. Data showing the effect of these discriminatory taxes for 1987 are presently being compiled and will be furnished to the subcommittee when completed.

Since 1984, when a measure similar to H.R. 2953 was first considered by Congress, the cumulative total of discriminatory taxation paid has been in excess of $300 million. Thus the benefit to gas consumers of legislation accomplishing the goal of fair

taxation would be substantial. Currently, for some of our members these taxes amount to about 2 cents per each 1,000 cubic feet of gas sold.

It is important to realize that pipelines serve consumers in areas far beyond the borders of the states imposing discriminatory taxes. Therefore, the taxes resulting from these discriminatory practices are effectively "exported" to citizens of other states. In some cases, this practice can actually cause regional inequities. For example, if Southern states with relatively short heating seasons subsidize the cost of providing their citizens with state and local government they effectively pass a portion of those costs on to all gas consumers, and consumers in colder Northern states will be hit the worst.

But regardless of the regional effect, exporting taxes is unfair. And what's more, the higher cost of gas service, including those costs attributable to discriminatory taxes, falls on consumers without regard to income, thereby having a regressive effect.

Discriminatory property taxes can skew competition between different sources of gas or delivery routes. If one pipeline carries gas through one or more of the states with discriminatory practices, that gas will be at a disadvantage with gas which came through states with nondiscriminatory practices.

The gas industry is becoming increasingly competitive these days, so this is not a theoretical concern. A surplus of deliverable gas, or the "gas bubble," has existed since passage of the Natural Gas Policy Act in 1978. From the pipeline point of view, the bubble has meant more gas competing for fewer markets. In October 1985, the Federal Energy Regulatory Commission (FERC) facilitated this gas-on-gas competition by approving an order encouraging pipelines to become open access carriers. Open-access pipelines are required to transport gas for anyone who requests it on a first-come, first-served basis to the extent of their available capacity. That means distribution companies or industrial users can buy gas from producers and get their open-access pipeline to transport it. This has opened up many new sources of gas for these distributors and customers and has dramatically increased competition between pipelines.

Notwithstanding this movement of pipelines toward open-access transportation, there are still many instances where customers have access to only one pipeline. Energy costs often determine whether or not a company is competitive. Thus, the higher gas costs resulting from discriminatory taxes in an industrial customer's gas bill may render that customer less competitive. This not only hurts the customer, but its employees and the communities that depend on the continued viability of that customer's business for tax revenues.

Additionally, these discriminatory taxes may result in even higher gas costs to customers because of "cost-shifting." Let's say a pipeline burdened with these discriminatory taxes loses industrial customers as a result. The effect on customers does not stop there. Every pipeline has a certain amount of fixed costs which do not vary with the number of customers served or volumes delivered. If industrial customers are lost, some of these fixed costs must be shifted to the remaining customers. Thus, these remaining customers face additional costs in their gas bills due not only to discriminatory taxes, but "cost-shifting" as well.

Some customers confronted by increased gas costs have more options than others. Nearly 60 percent of all industrial natural gas customers are capable of using more than one type of fuel. They can—and do—make "fuel switching" decisions on the basis of price differences of as little as a penny per thousand cubic feet.

Cost shifting hurts all classes of customers—residential, industrial, and commercial, and as more customers abandon the pipeline, more costs are shifted to the remaining customers, causing more and more customers to experience economics which favor switching. One can readily see that the residential customer is the unfortunate recipient of the increasing shift of costs.

Finally, there may be a misconception that the relief provided by federal antidiscriminatory tax legislation would be a direct increase to the pipeline's income. The fact is the FERC, which regulates pipeline rates, would ensure that any relief obtained as a result of this act would flow through to consumers.

Congress has enacted similar bills to prohibit states and their political subdivisions from discriminating against the railroads, the trucking and bus industries, and the airlines in relation to other commercial and industrial taxpayers in the same state. Thus, federal law now requires that state and local taxes on the railroads and other protected interstate carriers may not be inequitably higher than on other commercial and industrial taxpayers in the same state. This legislation is sound and has been effective in protecting these indusries from discriminatory taxes. Similar legislation should be enacted to protect the pipeline industry.

QUESTIONS OF SENATOR EXON AND THE ANSWERS THERETO

Question. Current Federal law treats the various transportation modes differently with regard to the issue of discriminatory or burdensome state taxation. The rail industry has the broadest relief, the motor carrier industry has somewhat less, and the airlines have even less since they do not have a grant of Federal court jurisdiction. The pipeline and waterway industries have no statutory authority at all. Is there a rationale for these differences in treatment?

Answer. Each of the industries named appealed on a case by case basis to Congress for relief from the unfair burden of discrimination by various states. This issue has a long history of concern for the interstate transportation industry. As I mentioned in my testimony, a comprehensive study of this matter was made to your committee in 1961 wherein it was pointed out that the natural gas pipeline and rail transportation industries were the two against whom discrimination was most prevalent. Some 15 years later the rails achieved legislative relief. We are still seeking our day in Federal court.

As far as differences in treatment are concerned, because each industry has had to build its own case before Congress over the years, variable legislative results have ensued. If an effective and uniform method of obtaining and keeping relief from state discrimination can be devised. I am certain the natural gas industry would support it.

Question. Each of the industries whose representatives testified at the hearing would like statutory authority to challenge State and local taxes at least as broad as the rail industry. How would you assess the cumulative effect on State revenues if all of your industries, as well as other interstate industries such as electric utilities and telecommunications, were granted similar relief?

Answer. As far as my industry is concerned, there are only 11 states which discriminate against our pipelines. As you know from our repeated testimony over the years, this unfair treatment ends up being paid by consumers in states far removed from the offending ones who impose the discrimination. Since the other industries you mentioned have not prepared fully the information on the impact of discrimination on their specific instances, or at least I am unaware if they have, I am not in a position to estimate the total amount involved. We estimate the discrimination against our natural gas pipelines runs about $67–70 million per year. Of course we have never advocated that we should receive any tax reduction per se, only that we should receive equal and fair tax treatment accorded other commercial and industrial concerns in the offending states.

Likewise, if states resisted the pattern of discrimination which exists against interstate activities, which most do in our case, the tax base could be adjusted fairly to prevent this "loss of revenue" which has been raised by offending states. Again, we are not trying to avoid taxes, only discriminatory taxes.

Question. How important are the provisions in your legislative proposal authorizing Federal injunctive relief and broadly prohibiting any other tax that discriminates, as in the rail statute?

Answer. We believe that the legislation would be virtually useless to us if the few states who do discriminate would turn around and find another method of imposing an unequal tax treatment upon us. This provision is critical to an effective cure for this problem.

Question. The legislation proposed in the House to benefit your industry only affects natural gas pipelines. Do you believe that oil pipelines deserve similar treatment?

Answer. Mr. Chairman, we do not condone tax discrimination against anyone, so therefore would not oppose relief for any industry. However, we have dealt with our own facts and history in detailing what we submit is a meritorious legislative approach for our situation. But please remember that the real beneficiaries of this bill are the American consumers of natural gas for whom we are required under our regulated structure to pass through any tax benefits or, for that matter, burdens, which is the present situation. Our industry only benefits from the standpoint of perhaps being able to offer slightly more competitive prices.

Senator EXON. Thank you very much, Mr. Verkler.

Mr. Joseph Farrell, the President of the American Waterways Operators. Mr. Farrell, I am delighted to know that you are here this morning. With the drought on the Mississippi River, I was wondering if your industry wasn't out of business. But we want to

get some water in that river once again so you can move grain. Welcome to you.

STATEMENT OF JOSEPH FARRELL, PRESIDENT, AMERICAN WATERWAYS OPERATORS

Mr. FARRELL. Thank you, Senator. You and I have the same problem. I don't think that you realize it. But it is always difficult to figure out whether it is Senator Exon or Senator Exon. My name is Farrell, not Farrell.

Senator EXON. I'm sorry.

Mr. FARRELL. The American Waterways Operators is the national trade association for the barge and towing industry.

We appreciate your sentiments with respect to the drought. Things are getting better.

If one looks at the calendar, one sees that it is late summer, but the barge and towing industry is in a tax winter. We are in a blizzard of taxes at all levels of government: Federal, regional, state, and local.

For example, at the Federal level, we are paying an inland waterway fuel tax which Congress has scheduled to double over the next few years. We are paying a leaking underground storage tank cleanup tax even though our fuel tanks are above ground. We are paying a Customs user tax. There are port maintenance taxes. There are port development user taxes. Every year, we seem to be faced with the threat of Coast Guard user taxes, and it just goes on and on.

With respect to state tax issues, the subject of this hearing, we are in the same position as the pipeline industry. We are naked to the states with respect to discriminatorily taxing our industry.

It is our own fault in my view that we find ourselves where we're at. How we got here is not entirely clear to me except we shouldn't be here. That is to say, we should enjoy, for all the obvious reasons, the same protections against the states discriminatorily taxing us as the other modes do. The pipelines and the barge industry are the two outsiders on the subject.

In closing, in listening to my colleagues here—Tom Donohue brought you a gift—it occurred to me that a perfect gift I think for elected officials, be they in the legislative branch of Federal or state government, or running for office for chief executive of a state or of the Nation—it seems to me the perfect gift would be to find a way for you all to impose taxes on other than voters. And I think that is what the problem is that we are wrestling with. I am not sure whether it is a consciously successful effort on the part of the Congress or whether it just stumbled into it over the years, but you are coming close to that perfect gift in the user tax.

What is happening in the Nation that found its beginning in the battle cry "Taxation without representation is tyranny" we are now finding that the Congress with user taxes is picking off one small sector of the American economy at a time. No public debate. No hearings. None of the appropriate democratic processes for imposing taxes. Just get a little bit of the economy at a time and collect it all together, and you end up with this blizzard of taxes that I referred to at the outset.

Our formal statement I assume will be included in the record.
Senator EXON. It will be as previously stated.
Mr. FARRELL. Thank you, Mr. Chairman.
[The statement and questions and answers follow:]

STATEMENT OF JOSEPH FARRELL, PRESIDENT, THE AMERICAN WATERWAYS OPERATORS

Good morning, Mr. Chairman and members of the subcommittee:

I am Joseph Farrell, president of the American Waterways Operators (AWO), the National Trade Association representing the U.S. barge and towing industry.

AWO member companies operate towboats, tugboats and barges on the inland waterway system, the east, west and gulf coasts, to Alaska, Hawaii and the Caribbean. Over one-half of the onboard jobs in the U.S. merchant marine have been created by the towing industry. In a typical year, there are more than 125,000 moves to and from over 200 U.S. cities; 87 percent of all U.S. cities are served by tug-barge movements. Almost 60 percent of grain exported by the United States is moved to seaports in barges, and 1 of every 5 tons of coal produced in the nation is carried by barge. Barge transportation accounts for 40 percent of U.S. petroleum movements. Our vessels transport about fifteen percent of the nation's intercity freight for just two percent of the total freight bill.

Trains, planes and trucks are more familiar to the general public than barges and towboats, but they are no more important. Quietly, safely and efficiently, almost invisibly, the barge and towing industry carries America's most critical cargoes. To illustrate the magnitude of the volume transported by our industry, it would take at least 15 railroad cars or more than 60 trucks to fill a single barge. One barge transports the harvest of 1,500 acres of farmland. The typical southbound river tow consisting of 30 barges has a cargo capacity equivalent to 450 rail cars, or more than 1,800 trucks.

AWO is encouraged, Mr. Chairman, by your holding this hearing today. State taxation of industries such as the one AWO represents has grown at a dramatic rate. There is no disagreement that both the federal government and the states are searching for dollars wherever they can find them. That is why, on the Federal level, towboat and barge operators are already paying an inland waterway user tax which will double by 1995 under the Water Resources Development Act, P.L. 99-662. Port user fees were also established under this act. The harbor maintenance fee established in P.L. 99-662 imposes a new tax on cargo transported by water. Cargo shipped through our ports by any other mode of transportation is not taxable. The industry now pays a tax for cleanup of leaking underground storage tanks, although our tanks are above ground. Additionally, many vessel operators are paying user fees to the U.S. Customs Service for paperwork processing.

Water carriers are also responsible for paying the 15.1 cent per gallon upfront highway tax which they do not owe; are penalized for furnishing crew members on vessels with meals; and are annually fighting off the threat of user fees for Coast Guard services.

All these taxes are in addition to the prime corporate taxes they must pay.

On the state level there are a host of taxes on water transportation services, equipment and fuel; for example, the West Virginia fuel tax; taxes paid to Placquemines Parish, Louisiana, for the privilege of operating in adjacent waters; discriminatory property taxes on marine equipment in Louisiana and a number of other States; and most recently, adoption by several States of the requirement paralleling the onerous Federal law that off-highway users pay State highway taxes, upfront. As you can see, and as others will testify, State taxation is significant. In addition to the financial burden, there is little consistency in the types or application of these taxes. For companies transporting vital cargo on the waterways through a host of States, the reporting burden is also a bureaucratic nightmare.

For example, on a 50-cent gallon of fuel purchased in West Virginia, towboat operators are paying 30 cents per gallon in taxes broken down as follows: 4.8 cents per gallon—West Virginia fuel tax; 0.1 cent per gallon—Federal leaking underground storage tank (LUST) tax; 10 cents per gallon—Inland waterway fuel tax; 15.1 cents per gallon—highway/LUST diesel tax (refundable; will be eliminated if technical corrections bill enacted).

The State fuel tax makes even more onerous the Federal tax bite.

We have been told that there is little likelihood of relief from the growing plethora of State taxes because they have no other source of revenue. That assertion is nonsense * * * pure and simple. This is a classic example of attempting to tax the easy way rather than the right way. It is time to examine the impact of these layers

and layers of taxation on any industry, including this one, which is providing a service to the citizens of the Nation.

In the mid-1970's, Congress recognized the need to restructure our Nation's railroad system and modernize the system to fit the contemporary era. One very important part of this modernization was the recognition that railroads were being severely harmed by the ability of States to discriminate by taxing the railroads at a higher rate than other commercial or industrial property or to tax the railroads in an arbitrary and capricious manner. The Railroad Regulatory Reform and Revitalization Act included a provision which prohibited this discriminatory taxation. Several years later, Congress adopted a similar provision for trucks, buses, and aviation. It is time that the barge and towing industry be given the same protections as the railroads.

One recent example of the effectiveness and equity of the statute can be seen in Minnesota. The State legislature imposed a 17-cent per gallon tax on diesel fuel levied on the various transportation modes, effective July 1, 1987. Because of the antidiscrimination clause contained in the Interstate Commerce Act, the railroads successfully challenged this Minnesota tax as discriminatory. As a result, the State legislature repealed the tax. Obviously, we cannot always depend on the rail industry to fight our battles * * * we must be equipped to wage similar challenges, where appropriate, with equivalent and equitable protection.

Over the past 5 or so years, vessel operators throughout the country have been experiencing economic molestation by a number of States. Were there a guarantee that other States would not follow suit, we could continue attempts to fight these unfair taxes at the State level. But it will not stop until all fifty States have extracted whatever revenue they can from the water transportation and other industries.

State court remedies have proven ineffective in fighting State tax discrimination. Appeals made to State tax boards or Commissions fall upon deaf ears primarily because the administrative appeal boards in many States are closely associated with the State tax assessors. Appeals to a State court traditionally result in the court deferring to the findings of the State tax agency. Enacting an antidiscriminatory State taxation provision for domestic water carriers would not prohibit States from taxing the industry; it would, however, allow tug and barge companies a more equitable Federal forum in which to plead their cases and will put the industry on equal footing with airline, bus, truck and railroad companies.

What is the impact on water carriers? Less cost efficient transportation and higher costs to the consumer because we must absorb these taxes in our rates. The barge industry, too few realize, is fiercely competitive, with hundreds of companies scrapping for business. In this environment, barge companies cannot pass on to customers increased taxes. Moreover, in a highly competitive industry such as ours, just now recovering from an unprecedented economic depression, companies cannot remain viable or provide shippers with rate consistency due to the increasing tax burden. While the financial condition of the tug and barge industry is improving, the situation is still very tenous. Attrition in the industry cannot be directly attributed to higher State taxes, but it certainly is devastating to the recovery of all companies large and small.

Mr. Chairman, it is our belief that there should be no State taxation of transportation industries engaged in interstate commerce. However, such legislation would not fly; we know that. We therefore urge you and your colleagues to extent the protection for the railroad industry contained in 49 U.S.C. 11503 to the domestic water transportation industry. It is patently unfair that all competing modes of transportation do not have the benefits of the provision.

Thank you for inviting AWO to testify at this important hearing. I would be happy to answer any questions you have.

QUESTIONS OF SENATOR EXON AND THE ANSWERS THERETO

Question 1. Current Federal law treats the various transportation modes differently with regard to the issue of discriminatory or burdensome State taxation. The rail industry has the broadest relief, the motor carrier industry has somewhat less, and the airlines have even less since they do not have a grant of Federal court jurisdiction. The pipeline and waterway industries have no statutory authority at all. Is there a rationale for these differences in treatment?

Answer. AWO is unaware of any rationale. The history of the various legislative initiatives which produced different forms of protection for the rail, motor carrier and airline industries, and no protection for the water carrier and pipeline industries, on the surface seems to suggest that whimsy played a part in the process. But,

much more likely, is that the results are a reflection of the efforts of the various industries and their champions in the Congress. In any event, an objective observer would have to conclude that the heterogenous character of the treatments of the different transport modes by the Congress needs to be made consistent.

Question 2. Each of the industries whose representatives testified at the hearing would like statutory authority to challenge State and local taxes at least as broad as the rail industry. How would you assess the cumulative effect on State revenues if all of your industries, as well as other interstate industries such as electric utilities and telecommunications, were granted similar relief?

Answer. This question cuts to the heart of taxing philosophy: in a democratic society, what is the proper way to raise revenues from the citizenry? The answer must be rooted in fairness. Clearly, however a state decides to raise the revenues it needs, it should not discriminate within any family of revenue sources in the process. That is fundamental. Once that is attended to, the state can proceed to impose taxes in such a manner as to avoid any undesirable "cumulative effects."

Question 3. Has any effort been made to quantify the amount of discriminatory taxes which you believe the waterway industry is paying?

Answer. Yes, though the effort is incomplete, it is ongoing. Preliminary results of AWO's research and analysis show that five states discriminate against water carriers in assessing property taxes, and four states discriminate against water carriers by imposing higher fuel taxes. The taxes impose a significant financial burden on each company operating in these states and also allow competing transport modes to offer more favorable rates because they are protected from paying equivalent discriminatory taxes.

Senator EXON. Gentlemen, let me begin the questions and then I will turn to my colleagues briefly. There will be, I am certain, several questions of this panel that we would like to ask you to reply to for the record because we do want to have a thorough understanding and have you have a thorough opportunity to answer our questions on this very important subject. And I have listened with great interest to each of your testimony, and you put forth, as you have in the past, a very interesting point and I think something that we are all very much concerned about. Again, I don't know the solution to it.

Let me ask any of you who care to comment on this. Particularly I would address the question to Mr. Donohue. You bring up a very important problem for your industry. We have known about this in the past and we haven't begun to solve the problem.

You know, I had almost forgotten about that initiative by the governors. I remember very well know when you began to talk about it, about how the states were going to come forth with a plan to solve this, and even I had forgotten about it until you jarred my memory.

Let me ask this question. To solve the problem that you all bring up, to solve the regulatory mess that we have in the trucking industry, just to take one, how do other industrialized nations handle this? Let's take trucks, for example, in Europe. If you think you have difficulty with rules and regulations between states, how do they handle that in Europe? Do they have some simplified plan or is their situation even worse?

Mr. DONOHUE. Over the last few years, the situation in Europe could be characterized as worse because they cross national borders. And as you have traveled in Europe, Senator, you know we have the checkpoints and so on.

However, in 1992 the European Economic Community will initiate a plan that will facilitate the movement of trucks, the payment of taxes and the conduct of commerce through the economic community in a way that is going to make them more competitive with

the other economic entities in the world. Further, it is going to be a serious matter for us because of the weight systems they are going to develop. They are going to say this is how the European community is going to conduct its transportation. This is the size of the containers. This is the paperwork they are going to have to fill out. They are going to make themselves more competitive while we continue to ask truckers, large companies and small companies, to fill out 50 pieces of paper, 50 separate arrangements of paper for anything they do in any of the states.

And just good common sense suggests that in a nation that has an interstate commerce provision provided in the constitution, that we would get to the point where we are smart enough with computers to reduce this maze of paperwork and to get down to a situation where an interstate trucker could pay once, could be audited once and could go about his business in a sensible way. And the only thing standing between us and that is the will to implement what the governors have totally agreed ought to be done. And I think that the Congress, perhaps working with the DOT and others, can expedite this matter.

The second thing, of course, while we are cleaning up the paperwork, is to get some equal protection under the law in terms of discriminatory taxation. If one competing mode can go right to the Federal courts, then we ought to be able to go to the Federal courts. Why should it take us 4 years to achieve the same objective that our competitor can almost overnight?

Senator EXON. That brings up a very tough question. One of the reasons for holding this hearing was to try and "fine-tune" the 4–R Act so that we would maintain the States rights in this area. What I am hearing from this panel is that what you are really saying is if the Federal Government, through the interstate commerce jurisdiction, is going to provide non-discrimination in taxes for the railroads, they have an obligation to do it for the other modes of transportation. That is your bottom line.

Mr. DONOHUE. Yes, sir. I think equity, common sense and fairness demand it.

Senator EXON. Mr. Briggs, I listened with interest to your testimony with regard to discrimination and what is happening today with taxes to the railroads. This is a parochial question, but I just want to try to get a handle on it.

Do you have an example off the top of your head or any specific case where you believe that Nebraska as a state has become more discriminating against the railroads, more so than they had discriminated, if they were discriminating previously? I say that as a former governor and a member of the State Board of Equalization. And we had extensive hearings each year on the railroad problems on taxation.

Since Nebraska is involved very much with this railroad problem on taxation today, has Nebraska recently discriminated any more so than in the past against railroads in your view?

Mr. BRIGGS. Off the top of my head, not beyond the area that we have talked about this morning, and that is where they exempt certain assets from personal property taxes. And if you run that list long enough, then pretty soon there are only railroad properties left. Or you may run it three-quarters of the way as they did in

Nebraska. So, there is only a quarter of the property left, and that ends up with the same unfair type of burden as the old and more blatant form of discrimination where we get taxed at rates that were twice as high.

Senator EXON. Thank you. Under our early bird rule, Senator Breaux.

Senator BREAUX. What does the early bird get?

Senator EXON. A second recognition.

Senator BREAUX. That is better than the worm.

Thank you, Mr. Chairman. Thank you really for holding these hearings. I think they have been very, very helpful.

I have enjoyed listening to the testimony of all of members of the panel. We have been involved with all of them for a number of years.

Many of these hearings that we have are really deja vu. We have been through all of this so many times and in so many different forums and places. But it is always good to review these issues.

Not to ignore the other members, but I want to chat with my friend, Jerry Verkler, from the Interstate Natural Gas Association on some of their testimony and some of his observations and their presentation on this issue.

Mr. Verkler, in your testimony, in trying to cite examples of discriminatory tax practices regarding interstate pipelines, you point out that in Louisiana interstate pipelines are assessed at 25 percent of the fair market value which amounts to $42.3 million in taxes.

In contrast, you point out other commercial and industrial property in Louisiana which includes, by the way, intrastate pipelines within the state, are assessed at only a 15 percent value which, if applied to your properties, you point out would produce a tax of only $25.4 million.

In essence, that says that if you were taxed like intrastate pipelines, you would be paying almost $17 million less in taxes, and I guess you carry out that argument that those tax differences ultimately are passed on to other states around the Nation, and it is a discriminatory practice. It is kind of like old Paul Harvey says when he talks about the rest of the story. You haven't given us the rest of the story.

I would suggest, and would you not agree, that the statement that you have made to the committee is only correct if your interstate pipelines were valued—their fair market value—the same as the fair market value for intrastate pipelines?

And that is clearly not the case in Louisiana. Public utilities that use your clients' gas and gas companies themselves went to court in Louisiana and got state courts, at your request, to value interstate pipelines at a substantially less value than we value intrastate pipelines. So, what I suggest is that if you had it this way, you are getting the best of both bites of the apple. You want the tax rate to be the same as intrastate pipelines, but you have a valuation for fair market value at a substantially lower rate than we have for intrastate lines.

The way the system works in Louisiana, would you not agree, is that if you have two pipelines running side by side in our state, one an intrastate line, one an interstate line, that the bottom line in many cases is that the intrastate line is paying a lot more tax than

the interstate line. And I can give you many examples of that because we have been through this time and time again.

Now, isn't what I am saying essentially correct?

Mr. VERKLER. Well, Senator, first of all, I know you have been through this. You were in the other body, as a matter of fact, when we made our most recent attempt to pass legislation.

Our people who live and work in your state and figure out these taxes and come up with our studies have found discrimination—and nobody knows more than we do the problems that the State of Louisiana has. It may be the hardest hit of all from the standpoint of the energy patch and is in dire straits. You do have problems. But our experts have studied this question over and over, and it is a fact. Your state discriminates compared to other commercial and industrial property. We are in the process of bringing 1987's figures up to date. But it is a fact, based on expert information that is given to me, that your state, more than any other, as a matter of fact, discriminates against us.

Now, I can't pretend to give you——

Senator BREAUX. Let me ask you this. How do we discriminate? That is a pretty strong statement and I totally disagree with you when you look at the bottom line and when you talk in terms of rate uniformity.

In most cases, is it not correct, that intrastate lines in our state, because of how the property is valued end up paying more in taxes than you do as an interstate line?

Mr. VERKLER. Well, the figures I have, as you correctly stated, almost $17 million more——

Senator BREAUX. That statement is only correct, Jerry, is it not, if your property was valued at the same fair market value as an intrastate line? And is it not correct that the fair market value assessed to an interstate pipeline in Louisiana is substantially less than the fair market value assessed to an intrastate line?

Let me give you an example. It is a very complicated issue, and I don't want to belabor the point.

Say you have one mile of pipeline. One is an intrastate line. It never leaves the state. And one is an interstate line. It goes to Chicago. And the interstate line has a 25 percent tax rate. The intrastate line has a 15 percent tax rate. But if your line is assessed at a fair market value of $60, but we give a $100 fair market value for the intrastate line, which is the case, you end up paying the same tax.

And I would submit to you that your statement is not correct when you talk about tax discrimination if you look at rate uniformity. The rate that you pay and the rate that the intrastate pays in that example is the same. And in most cases in the State of Louisiana, because of the discrepancy in the fair market value in which your people get a substantially bigger break, you end up paying less tax on that same piece of property than if you were an intrastate line.

Now, do you disagree with that, and if you do, why?

Mr. VERKLER. Our whole thrust is based upon the treatment of other commercial and industrial business, not just intrastate lines.

Senator BREAUX. But isn't that only part of the story. The part of the story that you have to factor in which you are not factoring in

for the purposes of this committee is the fair market value of your property. We give you a much better break because you sued for it and got a state court decision that you requested that you would be valued as if you were a public service property, whereas the intrastate lines, are assessed as if they were commercial property. You asked for that, and you got that.

Mr. VERKLER. Well, can I have permission, Mr. Chairman, to have our people look at Louisiana and submit for the record our view as to just what the facts are?

Senator BREAUX. Yes. I'll let you go. I don't want to belabor the point, but for you to say that it is discriminatory is not taking into consideration the other half of the story which is a major ingredient. And when you factor in the other half of the story, it is not discrimination I would submit. If you have evidence that that's different, I would appreciate receiving it later.

Mr. VERKLER. Well, we will submit the Louisiana story to you. And we are not here again in an attitude of interfering with the states. What we are after is an opportunity. Just by our saying there is discrimination doesn't make it so. We are after an opportunity to go in and prove where we feel there is discrimination.

[The following information was subsequently received for the record:]

INGAA

JERALD V. HALVORSEN
President
1660 L Street, N.W.
Washington, D.C. 20036

JERRY T. VERKLER
Senior Vice President
1660 L Street, N.W.
Washington, D.C. 20036

JOHN H. CHEATHAM, III
Senior Vice President,
General Counsel and Secretary
1660 L Street, N.W.
Washington, D.C. 20036

J. B. HIPPLE
Treasurer
P.O. Box 2521
Houston, Texas 77252

EXECUTIVE COMMITTEE

VERNON T. JONES
Chairman of the Board
P.O. Box 2400
Tulsa, Oklahoma 74102

KENNETH L. LAY
Vice Chairman
P.O. Box 1188
Houston, Texas 77251-1188

RICHARD S. MORRIS
P.O. Box 1492
El Paso, Texas 79978

DERRILL CODY
P.O. Box 2521
Houston, Texas 77252

ROBERT W. BEST
3600 Frederica Street
Owensboro, Kentucky 42301

October 12, 1988

Honorable J. James Exon
Chairman, Surface Transportation
Subcommittee on Commerce, Science
and Transportation
SH-428 Hart Senate Office Building
Washington, D.C. 20510-2703

Dear Senator Exon:

At the time of the hearings on September 16, 1988 Senator Breaux raised certain questions about representations made in my written statement concerning the discriminatory treatment of interstate pipelines by the state of Louisiana. I was invited to supply this letter for the record. The implication of Senator Breaux's questioning was that my testimony had overstated the amount of discrimination which actually exists in Louisiana against interstate natural gas pipelines. I have looked into this matter carefully with industry representatives who are knowledgeable about taxation in Louisiana, and have prepared this letter to respond to Senator Breaux, and to clarify the record.

During the 1974 Louisiana constitutional convention, state tax officials argued that interstate pipelines were being assessed at only 5 percent of fair market value and should be taxed at a higher ratio to generate additional revenues for the state taxing jurisdictions. In reality, however, existing Louisiana practices for valuing pipelines were resulting in the pipelines being assessed at 20 to 30 percent of fair market value prior to the constitutional change. The new constitution, which became effective in 1978, established an assessment ratio for pipelines at 15 percent[1] of fair market value. The state assumed that this would triple interstate pipeline taxes.

To comply with the new constitutional provisions regarding pipeline assessments for 1978, the state of Louisiana retained an outside appraisal concern to actually

---

[1] Beginning in 1980 the Constitution was amended to require interstate pipelines to be assessed on the basis of 25% of fair market value.

determine fair market value for pipelines. Much to the surprise of the state assessors, pipeline assessments based upon this fair market value and the 15 percent assessment ratio were lower than in previous years. Because these assessments failed to provide the higher assessed values, and thus higher taxes that the Tax Commission had anticipated, it retained another firm to conduct another appraisal of the pipelines. The second appraisal simply used "reproduction cost new, less depreciation" to estimate value, but ignored the standard practice of a deduction for obsolescence, both functional and economic, and did not use other recognized methods for determining values. These high "values" coupled with the 15 percent ratio produced the desired result of increasing pipeline taxes.

Because the Louisiana Constitution required the pipelines assessments to be based upon fair market values, the pipelines protested their 1978 assessments to the Tax Commission asserting that their property had not been properly valued in the first instance, and paid their taxes in two portions. The first was for the undisputed amount due; and the second was for the disputed portion of their taxes, which were paid under protest. The disputed dollars in the second portion were placed into escrow pending final outcome of the pipeline legal challenge.

In July 1979, the Louisiana Tax Commission entered into a settlement with the pipelines under which it agreed that the Commission would value interstate pipeline property for 1978 and in the future utilizing currently accepted appraisal practices. The Louisiana Tax Commission sought this settlement not only because the taxing jurisdiction needed the monies being held in escrow, but because the Commission had lost a railroad valuation case in March of 1979 involving essentially the same issues as the pipeline case. [See Oral Reasons for Judgment in Louisville and Nashville Railroad et al. v. Louisiana Tax Commission, No. 218, 032, Div. "D" 19 Judicial District (copy attached)]. The pipelines consent settlement (copy attached) provided that interstate pipelines would be valued properly in the first instance as part of the assessment process.

Intrastate pipelines continue to be taxed based upon replacement cost and a 15 percent assessment percentage. Senator Breaux's contention that the ratio assessment to fair market value of Louisiana intrastate pipelines is higher than that interstate pipelines may well be true. (We are not prepared to concede out of hand that intrastate pipelines are actually taxed higher.) But whether they are or not is beside the point since it in no way affects the fact that interstate pipelines are discriminated against in Louisiana. In determining whether discrimination exists, interstate pipelines are not to be compared to intrastate pipelines but are to be compared to all other

commercial and industrial taxpayers. Interstate pipelines are taxed on the basis of 25% of fair market value in Louisiana while other commercial and industrial taxpayers are only taxed on the basis of 15% of fair market value. This discrimination, as described in my written testimony, forms the basis for the calculations of the degree of discrimination and is, in fact, what exists today in Louisiana. While Senator Breaux would like to shift the inquiry to a comparison of interstate pipelines to intrastate pipelines, that is simply not the proper way to determine whether discrimination exists. The fact that a state may discriminate against some other small group of taxpayers in addition to interstate pipelines does not mean that the discrimination against interstate pipelines is any less.

If Louisiana chooses to tax its intrastate pipelines in a discriminatory fashion, that is a local matter. Louisiana is one of a handful of states that allows intrastate utilities, including pipelines, to be valued at a parish (county) level, rather than on a state-wide basis. If that county official discriminates against an intrastate pipeline, its customers bear the burden of the discriminatory treatment. However, those customers are citizens and voters of that taxing jurisdiction and in each election have a forum for expressing their objections. Thus, it is a local matter if a state or local jurisdiction imposes an excessive property tax on an intrastate pipeline.

In contrast, interstate gas pipelines generally have few employees within the affected jurisdiction, thereby limiting their local forum for redress of discriminatory treatment. In addition, interstate pipelines are regulated by the Federal Energy Regulatory Commission and the users of natural gas are typically several states away from the states or taxing jurisdiction imposing a discriminatory tax. Thus, the interstate pipelines only effective forum is in the federal courts.

Senator Breaux also asked whether pipelines favored "fair market value uniformity." The answer to that question is a resounding yes. In all of the antidiscriminatory tax legislation heretofore enacted by Congress and in H.R. 2953, legislation presently pending in the House to provide pipelines relief from discriminatory taxation, fair market value is the yardstick by which most forms of discrimination are measured. Fair market value is the beginning point of any ad valorem tax assessment. In any claim of discrimination it is absolutely essential that the court make certain that the property of the taxpayer claiming discrimination is properly valued. Senator Breaux should have no concern because if the pipeline is not discriminated against, the federal court will be in a position to determine this fact and will undoubtedly refuse to grant relief.

In conclusion, interstate pipelines are taxed in Louisiana on the basis of 25% of their fair market value while other commercial and industrial taxpayers are taxed on the basis of only 15% of fair market value. It is precisely this kind of discrimination that led Congress to enact legislation to provide for federal protection for railroads and other carriers. This discrimination resulted in interstate pipelines paying approximately $17,000,000 of discriminatory taxes in Louisiana in 1986. The settlement agreement referred to by Senator Breaux provides no favored treatment for interstate pipeline but only provides that they will be properly valued in the assessment process. The fact that Louisiana may still be discriminating against intrastate pipelines in no way lessens the discrimination existing against interstate pipelines when properly compared to other business taxpayers.

If I can provide any further information on this important issue, please let me know. I certainly appreciate the courtesy of you and your staff at the hearing.

Very truly yours,

Jerry T. Verkler

Jerry T. Verkler

Senator BREAUX. Do you know if your association, when you ask for tax rate uniformity, would also support fair market valuation uniformity?

Mr. VERKLER. Well, I wouldn't be prepared to comment on that right now, but we will get that for your record.

Senator BREAUX. I wouldn't think so.

Let me ask another question, if I may, on another type of approach.

In your testimony you go into the idea that the higher tax rates in a state hurt end users of the product because those taxes are passed on to the end user. And you kind of cited an example on page 4 where you talk about discriminatory taxes loses industrial customers as a result.

You point out further that if the industrial customer is lost, some of these costs must be shifted to the remaining customers. And, of course, that is correct. Thus, these remaining customers would face additional costs in their gas bills due not only to discriminatory taxes, but to cost shifting as well. And I agree with that.

But does not your association generally support FERC decisions allowing for interstate gas companies to bypass local distribution companies and serve directly industrial customers?

Mr. VERKLER. Well, we are opposed to legislation which would prohibit those in the marketplace to make those decisions themselves.

Senator BREAUX. You oppose efforts at saying that that should not be allowed, and FERC has generally been saying that should be allowed. Correct?

Mr. VERKLER. They have to go to FERC if they want to bypass. We say that legislation, which is pending, some of which might even be familiar to you——

Senator BREAUX. Yes, I offered it.

Mr. VERKLER [continuing]. That you are going to disallow us or disallow those parties. A customer and a producer would not be able to bypass a local distribution company.

Senator BREAUX. So, you are generally supporting the option of being able to bypass and serve an industrial customer directly.

Mr. VERKLER. Yes.

Senator BREAUX. Now, if you do that and that local distribution company loses that industrial customer, is it not true that the loss of that industrial customer, that the revenues coming from that industrial customer, if they are lost by the bypass, would then have to be passed on to the remaining customers that the local distribution company serves? And if that is correct, which I think it is, how does that differ from your philosophical objections to what you are saying with regard to discriminatory taxes?

Mr. VERKLER. Well, Senator, experts are going to disagree on that.

And I must reluctantly say that a few years ago we tried the same argument when our customers under contract went to FERC and elsewhere and were able to bypass the pipelines. And we used the argument, if you take them away from us, it is going to cause a burden on the remaining customers. As a matter of fact, that has not been borne out. The marketplace has worked relatively well.

But what is going on with the anti-bypass position is that you are trying to prohibit competition in the marketplace from working and keeping us from serving these customers or keeping the customers from making a deal with producers.

Senator BREAUX. The point is from a philosophical standpoint, your testimony is telling me that if you have discriminatory taxes, you are going to lose the industrial customer. And if you lose that industrial customer, your testimony tells me that those costs are going to have to be passed on to the remaining consumers and the remaining customers that are left. And that is bad.

Now, how is that consistent with your position on bypass when you lose the industrial customer and again those costs have to be passed back to the consumer? It is an inconsistent position on behalf of the association.?

Mr. VERKLER. What I'm telling you is the fact, to the best of my understanding and belief is, that the price for natural gas, as you have seen better than anyone else, from your state has gone down, down, down. And it hasn't resulted in——

Senator BREAUX. Why would it not cause a problem in that case, but you are telling me it would cause a problem in this case?

Mr. VERKLER. It would cause a problem for this reason because of what has been going on in our industry in the last few years. We are so competitive now. And, you know, you can look at this $70 million a year that we are complaining about, rightly so, and $300 million since 1984 when we started this most recent battle. That may not be a lot of money in the whole nation when we are talking about huge numbers, but when you get down to 2 cents or 3 cents an mcf, people like these industrial customers you are talking about can switch over to another fuel.

Senator BREAUX. What you are saying is if you lose an industrial customer because of discriminatory taxes, consumers that are remaining are going to be hurt. That is what your testimony says.

But if you lose that industrial customer because of a bypass operation, consumers are not going to be hurt. And that I would submit is very inconsistent.

Mr. VERKLER. We are not going to lose many industrial customers because of discriminatory taxes.

Senator BREAUX. You are saying that in your testimony.

Mr. VERKLER. Well, I mean, we are not going to lose many to an alternate fuel. They are going to be—they could possibly switch over, but those are fairly rare.

Senator BREAUX. That is what you are saying: if industrial customers are lost, these fixed costs would be shifted to the remaining customers. And you are saying that is bad. But if you lose your industrial customer and the cost shifts to the consumers because of bypass, that is good. That is not consistent.

Mr. VERKLER. Well, we will try to make it as consistent as we can. I realize that some of these arguments have been put together based on our previous positions, but our position is basically simple. Tax us whatever you will. Don't discriminate against us.

Senator EXON. Thank you, Senator Breaux.

I am pleased now to recognize my good friend and colleague from Washington, Senator Adams. I would simply say, Senator Adams, I don't know why you are sitting over there on the Republican side. You don't fool me.

Senator BREAUX. No, he thinks I'm on the Republican side.

Senator EXON. In any event, I recognize my friend, Senator Adams.

Senator ADAMS. I wanted to give you great comfort, Mr. Chairman, that I may have ameliorated my views during the years, which I know you would be happy to have me sit over here for a while.

Senator EXON. I don't believe it, but you're not under oath.

OPENING STATEMENT BY SENATOR ADAMS

Senator ADAMS. Gentlemen, I will not question in any depth this panel. As my friend and colleague, Senator Breaux, said, for many of us this is deja vu. As Yogi Berra used to say, deja vu all over again.

I helped the draft 4-R Act. I understand that the implementation of it and its purpose, of course, was to be certain that states did not use the non-voting interstate public going through it to keep from having to tax at a higher rate the local residents who voted for them.

I am concerned, however, Mr. Chairman—and I do want to be involved with you in this as we review the effects of section 306—that there has been an enormous number of legal actions that have prevented collection of tax. And I think and I hope it is still the position of the transportation industry that they are extraordinarily heavy users of state facilities. Even the railroads, which may own their own right-of-way, require both state protection and protection of right-of-way. Certainly the truck use on the interstate highway system and on the primary system is enormous.

I have read and reviewed the statements and I will continue to, knowing that we have to review again what is happening with this

system that we established to prevent discrimination. I really want to emphasize and save my time, Mr. Chairman, for this income tax problem which I think is in many ways a new one and rather outrageous. But I am well aware of your issues, and Senator Breaux and I will discuss in private the subject of interstate and local pipelines and bypass and FERC and so on.

So, Mr. Chairman, I appreciate the testimony, and I am prepared to move to the next panel.

Senator EXON. Thank you.

Mr. DONOHUE. Excuse me, Mr. Chairman. May I just make one statement?

Senator EXON. Certainly, Mr. Donohue.

Mr. DONOHUE. The Senator raises a very good point that I think from a trucker's perspective ought to be on the record. Senator, whatever the taxes are that the state needs to conduct its affairs in supporting trucking and keeping the roads in repair and safety and enforcement and environmental issues, we want to pay them. We want to pay our fair share and, in fact, we are willing to pay a little more.

What we would like to do is to make sure that we don't have to pay a huge incremental amount in paperwork and in bureaucratic structure that makes it twice as expensive to pay. And second of all, we would like the same access to protection from that occasional blatant discriminatory tax to get to the Federal courts that is now available to our major competitor. But it is important that people understand whatever it is the state needs to conduct the business related with trucking, we are prepared to pay that tax. We are not trying to duck the tax at all. We would just like to pay it in a cost effective way, and we would like the same protection in the courts as our competitors have.

Senator EXON. I just have one last question of you, Mr. Verkler. I have before me the Congressional Record of July 15 wherein there is a statement of the natural gas pipeline companies that indicate there are 11 states, I believe, that discriminate. Nebraska is listed as one of those states.

Is it possible for you to tell me specifically how Nebraska in your view discriminates against the pipelines? You know, they discriminate against me from that standpoint because they get taxes from me also. But on what do you base that?

Mr. VERKLER. Senator, I happen to have a little paragraph here on Nebraska which I would be glad to share with you since you raised the issue about your state.

In 1986 natural gas pipeline tax payments to the State of Nebraska were about $4 million. We have assumed in other calculations that we have made that approximately 80 percent of pipeline property is personal property, and that could vary depending on the individual pipelines. We feel that if we had legislation similar to that enjoyed by the railroad industry that approximately 80 percent of its property would be exempt, that this would result in the elimination of about $3 million of discriminatory taxes because of the exemption that they enjoy that we do not have.

Senator EXON. In other words, this is based on the fact that if the railroads are going to be eliminated from the taxes that they

claim they should be eliminated from, then that would be the discriminatory part of the taxes.

Mr. VERKLER. Right.

Senator EXON. If they are not eliminated, then it wouldn't be discriminatory.

Mr. VERKLER. Senator, I know the witness doesn't usually get to ask the questions, but I was very impressed in looking into this about that wise governor that I mentioned that vetoed a bill, but it was overridden. It started down this exemption road. And I presume, just on the record—and I may be completely wrong, but I presume that one of the concerns besides lessening of revenues might be if you start treating one category of taxpayers different, then the others are going to come along and ask for the same treatment.

Senator EXON. Well, we have a somewhat unique position. Maybe it isn't unique. Our constitution dictates that taxpayers should be taxed equally. I would simply remind you that I believe that our Supreme Court has said that what we eventually did in Nebraska was constitutional. And therefore the point that I am trying to make and your basic point is that it is discriminatory only if other industries, which I think our tax commissioner made that point pretty well in his testimony this morning, that if other industries aren't treated the same as the railroads are being treated, then we have a whole new problem on our hands.

Mr. VERKLER. That's right. And we support the provision in your constitution. We think it is fair.

Senator EXON. Gentlemen, thank you very much. There will be additional questions I am sure. We appreciate your making your response as quickly as possible.

We will call the third panel, a panel which is comprised of transportation workers. We appreciate the patience of the third panel that is made up of Mr. James Kennedy, Executive Secretary-Treasurer of the Railway Labor Executives' Association; Mr. Robert F. Blangeres of Spokane, Washington; and Mr. Ron Robinson, a member of Local 690, Spokane, Washington.

This is a panel that I might say was added at the request of Senator Adams. And since I felt that it was very pertinent to the case at hand, I agreed to add this panel. And I thank Senator Adams for his initiative in this area. Before I call on this panel, I would like to recognize Senator Adams.

Senator ADAMS. Thank you very much, Mr. Chairman. I appreciate your courtesy in adding this panel. I think it is extremely important. I am especially pleased that we are going to be able to this morning explore the difficulties that employees have both as truck drivers, railroad employees and others when they are assessed income taxes by numerous states through which they travel.

I became aware of this problem most recently in Washington State when I was contacted about it again in 1987. I had been talked to about it before, but it has become worse. I was informed of the efforts of Montana and Idaho to collect income taxes from the employees who are residents of the State of Washington simply because, Mr. Chairman, they traveled through the state as part of their job. They had no other contact with the state, and they just were on the right-of-way and doing their job.

91-521 0 - 89 - 4

And these taxes pose a particular problem for the Washington State residents because Washington State has no income tax, and therefore they cannot get credit in their state of residence. Yet, precisely because Washington State does not have an income tax, these individuals are paying very high property taxes, very high state sales taxes and other types of taxes in the State of Washington which are very high because of the fact that the State of Washington does not have an income tax. In some cases these workers, even retirees, are being asked to pay as much as $6,000 in taxes going back 6 to 8 years.

And truck drivers face identical hardships.

And I believe this situation is repeated in several other states, particularly Texas.

I am hopeful, Mr. Chairman, that this hearing will create a record so that this committee, as we are examining taxation by states, can act on this record so that we can bring some relief to these workers through uniform national legislation.

Mr. Chairman, it is a problem that has existed since the time of the Constitution. In fact, many people believe the Constitution was formed in great part because of the taxation in an unfair fashion between states. And we are great as a Nation because we do not discriminate one state against the other.

So, I appreciate the opportunity, Mr. Chairman, to have the panel and the chance to hear. And I appreciate the Chairman's calling this panel before us. And I welcome all of you and particularly Mr. Kennedy and Mr. Blangeres who are old friends.

Senator EXON. Thank you, Senator Adams.

For the information of the Chairman, this matter goes not just to railroad employees, but to truck operators. Is that correct?

Senator ADAMS. That is correct, Mr. Chairman.

Senator EXON. What other categories? What about a traveling salesman that lives in Washington State and travels to other states? Does it affect them?

Senator ADAMS. It does not affect them because they are not directly involved in commerce and involved in the transportation industry. For most of them, I might state, Mr. Chairman, the residency requirements are respected. And there is an allocation for no tax at all based upon their state of residence. Income taxes are pegged to the state of residence. That is what makes this so very unfair is they are just simply in commerce traveling back and forth and have no residence or other form of business connection that would make them subject to local income taxation.

Senator EXON. What about airline pilots and employees?

Senator ADAMS. We took care of that, Mr. Chairman, many years ago. And it was a terrible fight until that happened because we had people trying to tax pilots taking out of San Francisco. I am not sure we have completely solved it the way that it should be, but at least we did get to the point where every state wasn't taxing the pilots wherever they managed to cross.

Senator EXON. Well, then do I assume that this problem exists only or primarily in the interstate commerce areas of trucking and railroads? Is that accurate?

Senator ADAMS. That is correct, Mr. Chairman.

Senator EXON. Thank you. We will start out with you, Mr. Kennedy, and welcome, gentlemen.

STATEMENT OF JAMES J. KENNEDY, JR., EXECUTIVE SECRETARY-TREASURER, RAILWAY LABOR EXECUTIVES' ASSOCIATION, ACCOMPANIED BY D.L. LINDSEY, VICE PRESIDENT AND NATIONAL LEGISLATIVE REPRESENTATIVE, BROTHERHOOD OF LOCOMOTIVE ENGINEERS; AND JAMES M. BRUNKENHOEFER, NATIONAL LEGISLATIVE DIRECTOR, UNITED TRANSPORTATION UNION

Mr. KENNEDY. Thank you very much, Mr. Chairman, and thank you for the opportunity to come here and speak on this subject. And I also thank Senator Adams for bringing this matter to your attention so that we would have this opportunity. I really appreciate it. We think there is an inequity here that should be addressed.

I have a very brief statement. I'm accompanied by representatives of both the Brotherhood of Locomotive Engineers and the United Transportation Union, the two operating unions in the railroad industry. Don Lindsey is the National Legislative Director of the Brotherhood of Locomotive Engineers. And I am accompanied also by Bob Blangeres representing the United Transportation Union, who is a worker in the State of Washington who himself has experienced and can and will testify to how this inequity has affected him and his brothers and sisters.

Over the last several years, railroad employees, particularly those in operating capacities, have had problems in connection with the payment of state income taxes. Over the years this problem has not gotten better; it has only gotten worse. Currently road employees who run over 50 percent of their mileage in the state have had state taxes withheld for that state. But because of loopholes, some states in which railroad employees operate less than 50 percent would not withhold taxes, but would still collect them by garnisheeing entire paychecks to collect back taxes and penalties.

The situation is creating record keeping nightmares not only for railroad employees, but also for railroad companies. The employee must keep track of every mile operated in which he operates in calculated against that state's income tax. As you know, railroad employees operate in many different states. Some railroads do, indeed, keep accurate records and make these records available to state taxing agencies. Other railroads do not keep applicable records at all, thus allowing employees on parallel routes to be treated unequally. For example, it might well be that in the same states, for instance, an employee on the Santa Fe may be paying tax while an employee on the Southern Pacific may not.

Recently we are informed, to give you a horror story, an example—we think it is a horror story. A tower operator in the State of New Jersey, who controls the signals for trains entering and leaving New York and who does nothing more than push a button in the tower in New Jersey to clear a signal located in the State of New York, has the State of New York attempting to collect income taxes from him.

Amtrak seems to have taken what we would describe as an enlightened attitude, allowing the employees to designate their state

of residence, allowing the person to pay income taxes earned in the state of residence.

We would hope that Congress would place this policy into law so that there would be an equality of treatment of railroads, their employees and the states. It is not our intention to support legislation that would deny the states their portion of taxes.

We are advised that current Federal law is drafted in such away that allows railroad employees' salaries to be taxed in multiple states and allows some railroad employees who live in one state, but work in another to pay no state taxes.

The method we have suggested would make it easier for the states to collect taxes and not require additional record keeping by both the railroad and the employee and should result in either no loss or no significant loss of revenue for any state.

That's the end of my statement.

Senator EXON. Thank you very much, Mr. Kennedy.

Mr. Blangeres, you are next. Welcome.

STATEMENT OF ROBERT F. BLANGERES

Mr. BLANGERES. Thank you very much, Senator.

Senator, I have been working on this with our employees in Spokane, over 500 of the employees themselves. I work a route mainly between Spokane and White Fish, Montana.

And in 1982 the Department of Revenue of the State of Montana requested payroll information from the company that we work for. Actually I believe that they went a little further than just requesting it. I think there was a little arm-twisting.

But they received the information, and after that they sent out tax letters to over 500 of our employees requesting 5 years' back taxes and that if they didn't get it, they were going to garnish wages and liens against real property.

We obtained an attorney at the time, but wound up settling the issue. And it cost us over $800,000 for all the employees in Spokane.

This also put us on the Montana State tax rolls ever since, and each year it has come to right around a figure of about $200,000 a year for all of our employees.

Since then right on the heels of the Montana issue, Idaho was right directly behind that settlement. And we changed the people that was handling the case from the Montana issue to myself that handled the issue with the State of Idaho. And since then that case has cost us over $115,000 to take the case all the way to the Idaho Supreme Court.

I do have the Idaho Supreme Court's opinion. We won the case. The Supreme Court said that there has to be an economic connection to the state before there's any taxes owed.

We also wound up having a border war between the states. Our state legislators have also asked that the Congress of the United States to present some form of legislation.

Utah also got into the act because there was a problem between Utah and the State of Idaho. And that finally ended with legislation coming out of the State of Idaho.

We also have a GAO survey that came out in, I believe, September 1984. And that survey also said that the Federal Government restricts what the states can do. And they did also mention the U.S. Code 11-504(d) that there has to be more than 50 percent before any payroll information can be turned over to the states.

We would have been paying taxes to two and possibly three states, Senator. I have people that work from down in the southern part of Washington into Oregon. In a 2 week pay period, they come back to Spokane, work from Spokane and through the State of Idaho and in Montana. Plus they have to pay Washington State sales tax plus Federal. And that is five people that are taking a chunk out of our payroll, Senator Exon.

I don't know when it is going to come to an end, but we are going broke.

I have been talking with the company about this, and I think we might be able to get something ironed out as far as some of our withholding goes. And so, that is good there.

Our attorneys did research on the garnishment issue. Montana, since we won the case in the Idaho Supreme Court, stepped up their attempts to garnish our people's wages. I have one fellow in particular that has had his whole, entire check garnished not once but twice by the Department of Revenue of the State of Montana. And there was no letter even sent to him that Montana was going to do this. They did prior send a letter after they got the information that he owed so many years' back taxes.

And now I have three people, possibly four—I have four. Excuse me. And I have their documents in my brief here, if you care to look at it, of the garnishments themselves that's going on right now.

And I have one fellow that was garnished by the Montana Department of Revenue. And they over-garnished him, and he called them up and wanted it stopped and wanted to know why. And the people over there actually just laughed at him. And they said that because you would not cooperate, this is just what happened.

And it is an ugly thing to have to bring this before you, Senator.

I will have to say this. We cannot afford to support three or four states plus Federal. And who can keep up with paperwork at that magnitude?

I don't know if you read my letter, but I also have here that I got from our employees—these are individual tax records from each that shows the amount of the taxes that the employees have paid to the State of Montana or Idaho.

[The statement follows:]

STATEMENT OF ROBERT F. BLANGERES

My name is Robert F. Blangeres, and I am the chairman of a committee representing approximately 500 railroad workers in Spokane, Washington, who work on Burlington Northern through-freight trains between Spokane and Whitefish, Montana.

Because of our traveling through the State of Idaho and into the State of Montana, we have become subject to Montana and Idaho non-resident state income taxes. This came about as the result of an action brought in 1980 by the State of Montana concerning its alleged right to tax us. While we strenuously resisted Montana's attempt to tax us, we ultimately settled the case out of court due to negative legal representation and continued threats by Montana to garnishee wages and to place liens against our property. The settlement with Montana required the pay-

ment of back income taxes for the years 1979 through 1981, amounting to over $800,000. We have been placed on the Montana tax rolls and are required to file annual income tax returns in Montana. Some employees have failed to file annual returns in Montana and have had their payroll checks garnisheed without due process. The Montana Department of Revenue merely advises the Burlington Northern that an employee owes taxes and the Burlington Northern sends a portion of the employee's check to the Montana Department of Revenue. In some instances, the alleged tax has been more than the employee's paycheck and the employee has received no pay for the period. In addition, the employees who have had their checks garnisheed received no notice from the State of Montana nor the Burlington Northern that this was going to be done.

In July 1983 the Idaho Department of Revenue sent us what were called "amnesty" letters threatening to garnishee our wages and attach our property if we did not pay five year's worth of back taxes by August 1, 1983. The State threatened to go back even further if we did not meet its demands. Payment by August 1, 1983, on the average, would have resulted in a payment of $5,000 by each employee for the five-year period.

We felt that payment of this sum, coupled with future financial liability to the State of Idaho, and payment of income taxes to Montana, created an unjustifiable hardship on these employees. The State of Washington does not have an income tax against which a credit could be taken, and there was no way that a reciprocal agreement could be negotiated. In addition, we did not believe we were liable for payment of taxes because we received no benefits from the State for which it should receive compensation. While the situation was similar to that in Montana, we do not stop in Idaho—we do not set foot on its soil; we travel across the state on tracks laid on rights-of-way owned by the railroad—not the state.

According to the Idaho Code and the Idaho Non-resident tax return instructions, a non-resident may be taxed when the base of business operations is within the state and income is derived from Idaho sources. Our situation satisfies none of these criteria, but Idaho has been able to focus on railroad employees because we work on a fixed route, and because the Burlington Northern has voluntarily provided the state with payroll information in violation of 42 U.S.C. 11504(d).

To combat the additional tax burden posed by Idaho, we filed suit in 1983 against the State of Idaho Department of Revenue and Taxation.

The lower court found in favor of the Idaho Department of Revenue and we appealed to the Idaho Supreme Court. Earlier this year, the Idaho Supreme Court ruled, in a 3-2 decision, that Idaho did not have the right to tax us. However, the Department of Revenue has applied to the Idaho Supreme Court for a rehearing and the case is still pending. In the past five years we have incurred legal expenses in excess of $100,000.

In 1986 we filed suit in Federal District Court for the Eastern District of Washington against the Burlington Northern for injunctive relief to prevent the BN from supplying further payroll information in violation of federal law, to the States of Idaho and Montana. Both States were allowed to intervene and the case was dismissed, the court holding that this was a matter which could be dealt with better by the States. We have appealed to the Ninth Circuit Court of Appeals and hearing is set for October 6, 1988.

In 1984 and 1985, Congressman Tom Foley saw the inequity of the railroad employees' situation, and the House of Representatives passed legislation containing amendments to relieve us of this tax burden. However, due to opposition in the Senate, the amendments were dropped.

As railroad employees, we derive less benefit from the states which are trying to tax us than do tourists who travel their highways and use their parks, campgrounds, and other facilities. We are not attempting to be relieved of a fair and just tax burden, but rather we are attempting to be taxed in a more equitable manner as in the case of airline employees. In 1980, a bill was passed by both the House and the Senate and enacted into law exempting airline employees from multi-state taxation. Airline employees had the same problem: they are involved in interstate commerce and were being subjected to multi-state taxation. At one time even Congressmen and Senators were subject to multi-state taxation. We feel very strongly that it is only just and equitable to relieve railroad employees engaged in interstate commerce from multiple state income tax burdens.

We urgently request your help by giving favorable consideration to legislation which will benefit not only the railroad workers I represent, but those throughout the nation who face the same problem.

Thank you.

Senator EXON. Thank you very much, Mr. Blangeres. I was very much impressed with your testimony. And I will be looking at the letter and the other things that you make a point of. I can see the serious situation that it is, and I was not aware of it before. Thank you for your testimony.

Mr. BLANGERES. Thank you, Senator.

Senator EXON. Our last witness today is Mr. Ron Robinson. We welcome you here, Mr. Robinson. I had heard earlier that you had some petitions, and I assume those are the petitions stacked in front of you which gives a pretty vivid and visual concern to an awful lot of transportation workers. Please proceed with your testimony.

STATEMENT OF RON ROBINSON, MEMBER, LOCAL 690, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Mr. ROBINSON. Thank you, Mr. Chairman. I appreciate the opportunity even if I am nervous.

I am here today to explain what is happening with respect to non-resident income taxes imposed on interstate transportation employees and independent owner-operators.

My name is Ron Robinson. I live in Spokane. I work for a produce outfit out of Spokane. My route takes me into Montana through Idaho, which is approximately 75 miles wide there. It is about 20 percent of my driving time.

In October 1986 I received a letter from the Idaho Tax Commission requesting that I fill out all these non-resident income tax forms along with interest and penalty fees for the income that I had earned while running through the state. I might add that all I do is pass through that state.

I have a coworker that runs into Idaho, delivers and spends approximately 30 percent of his time. He was assessed for $2,700 in back taxes and $1,100 of that was interest and penalty fees.

At the time was completely unaware of this non-resident income tax situation. I didn't even know the tax existed.

I talked to a lot of coworkers. We organized an organization called Truckers Against Non-Resident State Taxes, sought legal advice and went after Idaho in the courts to challenge their non-resident income tax law. At the time my attorneys had explained to me that it was quite possibly unconstitutional—this non-resident income tax.

Using the same basis of what my coworker was based on, my tax liabilities would be around $2,000. And I believe this could only be a tip of the iceberg to others involved in interstate transportation.

Our group then got a hold of Senator Adams, Congressman Foley. And they fully understand what the problems could be on this non-resident income tax and what it would do to interstate transportation.

We starting talking to Idaho and Washington legislators. And the Washington legislature acted quickly on a retaliatory tax or excise tax I think is what they called it. And then talking to the Idaho legislators, we pointed out various ways how unpopular this particular taxation was.

The Utah legislature passed a retaliatory tax hoping that Idaho would get the message that this tax wasn't fair. The pressure came down on the Idaho legislature and they passed the bill and the retaliatory tax wasn't signed by the Utah governor.

Think for a moment, if you could, on a trucking company that has approximately 200 trucks and drivers. And this domino theory effect on the non-resident income tax is allowed to run, the amount of money required to keep track of all the records of all these drivers running in as many as 30 and 40 states.

For instance, an outfit based out of Colorado or Missouri and they have trucks going in each direction, all these drivers are faced all at once getting forms from every state in an amount like this of six years of back taxes. The companies would have to go to insurmountable costs to keep the records of what's going on. That would be approximately, say, 35 states that came down on 200 drivers is approximately 7,000 state income tax documents that would have to be taken care of.

An independent truck driver who runs approximately 325 days a year faced with the same problem of 30 states or so requiring him to pay non-resident income taxes—he couldn't take the time off, the 30 days or so, that it would take to fill out these forms. He has to keep running to keep his truck going and his family going. And at the cost of hiring a tax expert from $40 to $80 per filing, it adds up to about $4,000 just in filing fees alone.

I'm asking you where is all this stuff going to stop. I pray that you are beginning to see the immense burden it would be to the trucking industry. It affects both employees, management and independent contractors engaged in interstate transportation. And if their costs are increased, then of course those increases will be reflected in higher transportation costs and ultimately higher prices to consumer goods.

Gentlemen, 150 years ago the Articles of Confederation failed largely because of the problems of borders of the states. And I might add no state is self-sufficient. We depend on each other to coexist. And this kind of taxation would only separate us.

Thank you.

[The statement follows:]

STATEMENT OF RONALD ROBINSON, REPRESENTING LOCAL UNION 690, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

I am here today to explain to you what is happening with respect to nonresident state income taxes imposed on interstate transportation employees and independent owner-operators.

My name is Ron Robinson. I live in Spokane, Washington, and I drive a truck for a produce company based in Spokane. In the course of my work I travel in three states: Washington, Idaho, and Montana. I would like to stress that I make no pickups or deliveries in Idaho, however I do make some deliveries in Montana.

In October of 1986 I received a letter from the Idaho Tax Commission requiring me to file nonresident tax forms, and ordering me to pay taxes, penalties and interest dating back to 1980. Up to that point I had received no notice of any Idaho laws requiring me to pay state income taxes for simply driving through the state. My company is not based in Idaho and I spend roughly 20 percent of my driving time there. The route through the Idaho panhandle is relatively narrow, approximately 75 miles.

One of my coworkers was assessed $2,700 by the Idaho Tax Commission, including $1,100 in penalties and interest. He spends 30 percent of his workday in Idaho.

Although I was never specifically assessed a dollar amount by Idaho, some of my co-workers and I could read the handwriting on the wall. We organized an opposition campaign to this tax locally in Washington. Our lawyers inform us that a tax of this type may not be constitutionally permissible, and we have challenged it in the Idaho courts. My own tax burden, which I calculate at roughly $2,000, represents just the tip of the iceberg for all truck drivers nationally.

Our group also worked with Senator Adams and Congressman Foley, who fully comprehend what would happen to the movement of goods between states if taxes of this type were not overruled by Congress. We also worked with the state legislative bodies of Idaho and Washington. We were able to show Idaho's legislature just how unpopular the tax was with their citizens. But we did not do it alone; both the Washington and Utah legislatures passed retaliatory taxes. These bills received a great deal of publicity, but neither was signed by the Governors.

Because of this pressure, Idaho's residents understood what could result from this kind of taxation. Idaho's Legislature passed a bill exempting me, and others like me, from state taxation in Idaho. The bill passed both Houses in one day.

However, there are still serious problems. One is that the Idaho bill which exempts me may also be unconstitutional. Another is that their legislature could change its mind at any time. More important and more fundamental, however, is that 35 other states have similar tax laws, which I understand may be acted upon at any time.

Think for a moment what would happen if every state taxed truck drivers who passed through the state, or came into the state only periodically. I know of many independent truck drivers (owner-operators) who drive in more than twenty states every year.

Compliance with the tax laws of ten to twenty states would be a nightmare. Just to determine the basis for the tax would take a great deal of effort. Just as a case in point: Idaho's laws make either mileage or hours in the state the basis for taxation, depending upon how the nonresident is paid. After making the necessary computations, filing may be required. Even if the driver did not have to actually pay a great deal of money to each state, just complying with the filing laws—or even to see if the law requires filing—would take time, and money, that none of us have.

Now imagine if you would a company with 200 trucks, doing business in all 48 states, operated out of one state, like Colorado or Missouri. In addition to paying its own state's income taxes, it would have to keep track of each of its trucks and drivers with a view to compliance with at least 35 other state income tax laws. These states may not, and probably do not, have uniform methods for taxing nonresidents. So our hypothetical company with 200 trucks would not just have to keep track of every driver's miles and hours in every state. It would have to keep track of whatever every state uses as its basis for taxing nonresident transportation employees.

Think of the expenses involved here. With 200 employees and 35 states to deal with, our hypothetical company could conceivably have to file 7,000 state income tax documents. I submit that no company could do that.

Now what about the independent owner-operator? He's having to run 325 days or more a year just to keep his truck, trailer, insurance and state and federal taxes paid for. Then there is the rent and family expenses. Economically, the owner operator could not afford to stay home the 30 days or so it would take to fill out these 60 forms. He would have to hire a tax expert at $40 to $80 per filing. Granted, the taxes in each state would usually be minimal in dollars paid out, but compound it times ten states and six years, plus filing fees. We are talking about $4,000 filing fees, plus whatever the taxes, interest, and penalty fees, if my case is typical for owner-operators. They just could not handle this financially! And if the independent could not handle this, what is he to do when his truck is impounded or his home liened for non-payment of these taxes. What about the repercussions for financial institutions which financed these trucks and homes?

I ask you where does it stop?

I pray you're beginning to see the immense burden this would lay onto the trucking industry. It affects both employees and management. And if their costs are increased, then of course those increases will be reflected in higher transportation costs, and ultimately, higher prices for consumer goods. There is no such thing as a free lunch.

Ladies and gentlemen 200 years ago the Articles of Confederation failed, largely because of problems at the borders of the states. Commerce has to move if we are to be one country, not 50 countries. People have to be free to move their goods and services. I respectfully request that your committee take a hard look at legislation which would permit commerce, and people, to move freely between our states, and make it impossible for states to tax the people who provide this necessary service.

Senator EXON. Thank you, Mr. Robinson.

Clarify for me, if you can, gentlemen, one of you or all of you. I assume that this problem occurs only in states that have workers that go across state lines as a part of their responsibility and if they live in a state with no income tax. And I can think of Texas, no income tax, Washington State. South Dakota has no state income tax.

Senator ADAMS. There are 11.

Senator EXON. There are 11 of them?

Has this problem reared its head in other states to any significant degree? You keep talking about Idaho and Montana. Those are the main problems. Is that right?

Mr. ROBINSON. Yes, sir.

Senator EXON. Have there been difficulties with other employees in other states besides Washington workers who are being taxed by Idaho and Montana?

Mr. KENNEDY. Yes, Mr. Chairman. Just to provide the answer, I can also introduce someone who joined us after we came up here, the National Legislative Director of the UTU, Jim Brunkenhoefer, who I am sure can answer that question.

Senator EXON. Jim, we're glad to have you. Would you repeat your name for the record?

Mr. BRUNKENHOEFER. James Brunkenhoefer, the National Legislative Director for the United Transportation Union.

Excuse my tardiness. I was on the phone getting some additional information about Texas. And two instances immediately came. It appears the states are so eager to reach across the state line to what they appear to be greener pastures. In some cases they don't get their own.

I just got off the phone with a guy who lives in Anthony, New Mexico, who drives about 20 miles into Texas, is a resident of New Mexico and the kids go to school there, but because he works from El Paso, Texas, to Sanderson, Texas, pays no state income tax because he is in Texas while the Texan who lives in Texas who works in New Mexico is paying a New Mexico income tax.

And we have an instance of where our crews are working between Houston and Lafayette, Louisiana—Senator Breaux is not here—where the crews out of Lafayette—it's approximately 100 miles on each side of the border, Lafayette to Houston—are paying taxes on 100 percent of their earnings because they are residents of Louisiana, and the people from Texas are paying income tax on half their earnings that they make in Louisiana. And so, it is like Louisiana gets it both ways and New Mexico doesn't get it at all.

We have instances of where the crews work out of Gainesville and Denison, Texas into Oklahoma have the same problem.

We have crews that work from Mineola, Texas into Little Rock, Arkansas where they have similar type problems where the people from Arkansas are taxed and the people from Texas are taxed too. Some of the times we have even had instances where the mileage has been made so long that where there would be like one-third in the state of the residence and two-thirds in a non-income tax state, and in some cases they have avoided paying any taxes.

And seemingly the easiest way out is just let everybody kind of get their own. Let the person who lives there, whose kids go to

school there and use the services, rather than seemingly losing some of your own residents. You're not even getting any taxes from them. He is the only guy on the block who is not paying income tax in that state simply because he drives across a state line and goes to work for a railroad while you have another person who is across the state line who is paying your tax.

And it is not isolated in Spokane. It is a problem of where many states—being a Texan, I know that we only have problems in Louisiana, Arkansas, Oklahoma and New Mexico. In the State of Texas, their legislature has chosen not to have an income tax. If they did, they could probably get reciprocity with the states around them. But because Texas chooses through its legislature to, instead, go to a sales tax and other taxing methods, in effect, is that the people in that state are paying a higher state tax because of the method of taxation being used in that state. Then they have to pay the income taxes in the other state. Had they passed an income tax, these group of people would have probably gotten a reciprocity like most other states do. So, it is not isolated just to poor Senator Adams' state.

Senator EXON. Thank you. Gentlemen, I have no further questions. Thank you for bringing this matter to our attention. I can see it is a very serious one.

Senator Adams.

Senator ADAMS. I have no further questions, Mr. Chairman. I appreciate all of you being here. We are hopeful that the committee will move to solve this problem as we have earlier done with the airline pilots because it is something that just simply needs to be corrected for the benefit of all parties concerned.

Thank you, Mr. Chairman.

Senator EXON. Thank you all for your excellent testimony, and we appreciate very much.

And we stand adjourned.

[Whereupon, at 12:03 p.m., the subcommittee was adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF HON. DAVID K. KARNES, U.S. SENATOR FROM NEBRASKA

Mr. Chairman and Members of the Committee, I appreciate the opportunity to share with you my concerns about a problem which threatens not just my own state of Nebraska but many other states as well. The problem, of course, is that increasingly, a provision of the 4-R Act, the Railroad Revitalization and Regulatory Reform Act, which was originally intended to curb abusive or punitive state ad valorem taxation of railroad property is now being used to trample on perfectly legitimate state tax policies.

As you know, Mr. Chairman, our state of Nebraska assesses an ad valorem property tax on personal property, that contains several exemptions, including personal property of charities, educational institutions, and equipment and supplies used in agriculture. This means that the personal property tax is primarily assessed on the non-farm business equipment. The state derives just over $150 million in revenues from these levies, a sizable sum in any state budget, but especially critical to smaller states like Nebraska.

Mr. Chairman, the Commerce Clause and the 14th Amendment Equal Protection Guarantee provide powerful protection for business which are being unfairly treated by a state tax scheme. It is important to note, however, that going as far back as 1920, the Supreme Court's decisions have made it clear that states enjoy wide latitude in classifying and exempting types and classes of property based on legitimate policy considerations. There is no doubt that Nebraska's exemptions from personal property taxation are well grounded in sound policy judgments and would be readily upheld if challenged under the United States Constitution. This point is important for the Committee to keep in mind. You need to know that apart from the problems created by the 4-R Act, there is nothing, absolutely nothing about Nebraska's personal property tax system that offends the constitutional provisions that protect all of American commerce.

One other point of federal law is involved here: the Anti-Injunction Act, which prohibits a federal court from enjoining the collection of any state taxes so long as the state itself affords an efficient remedy. The Anti-Injunction Act has over the years been a vital part of our scheme of federalism, in which respect for the coordinate levels of government is so important.

The 4-R Act contained a provision, Mr. Chairman, which put railroads in a virtually unique position in American business. It enacted a simple mechanical test of discrimination—5 percent or greater deviation from assessments of other businesses. It gave the railroads the right to complain in federal courts about discrimination, as measured this way. It overcame the otherwise plainly written and strictly enforced prohibitions of the Anti-Injunction Act, and gave railroads the ability to obtain a federal court injunction to halt the collection of state taxes.

Congress in 1976 was obviously looking at a very different railroad system than we have today. It is, I think, a tribute to the sustained efforts of Congress and so many others that our railroads have come so far in so relatively short a period of time. Today, we have a vibrant, healthy, self-sustaining, privately financed rail transportation system, largely deregulated and free to compete like any other businesses.

In 1976, it must have been very hard to envision what has become of the railroads today. In those days, the railroad industry was slowly and surely decaying, suffering from decades of antiquated regulations that starved the system of capital and traffic. Huge bankruptcies had occurred, more were threatened. It was truly a national crisis.

Undoubtedly, one part of the problem was the fact that some states yielded to the temptation to heavily tax railroad assets, which of course couldn't be picked up and moved to other states. The tax anti-discrimination provisions of the 4-R Act were based on the facts and represented well-intentioned policy judgments. Given the distress that the railroads found themselves in, and the damage that could be done to our national economy by further deterioration, we cannot fault Congress in 1976 for

granting to the railroads extraordinary, unique and unprecedented remedies to end state tax abuses.

These provisions have served their purposes, but they have not stood the test of time. As so often happens, when circumstances change and the law does not, the potential for unintended consequences can be great. The experience of the state of Nebraska offers a perfectly illustrative example.

Last year, a series of federal court lawsuits were filed by railroads and railroad car owners, alleging that the exemptions in the Nebraska personal property tax regime constituted unjust discrimination under the 4-R Act provisions. The federal courts enjoined the collection of over $10 million in personal property taxes. The consequences were immediate and devastating. Some school districts and counties lost ten to twenty percent of their revenues, at a time when farm economics already presses hard on scarce budget resources. The State Legislature had to make a one-time appropriation of $7.7 million to help alleviate these sudden sharp revenue losses.

I know, Mr. Chairman, that you and the members of the Committee appreciate the impact of losses of this magnitude. The ultimate impact, however, is still unknown and could ultimately wipe out virtually all of the state's revenues from personal property taxes. Other industries are now lining up to argue in court that they, too, should be relieved of the personal property tax because of the exemptions.

This is a perfectly absurd result. An unquestionably legitimate and appropriate policy judgment to exempt farm equipment, which is clearly permissible under the constitutional tests applicable to all business, is now being whipsawed from courthouse to courthouse, draining badly needed revenues, because of application of a provision that could not possibly have been intended to produce such results.

We can hardly blame the railroads for taking advantage of the law, and we should certainly expect that they will continue to look for opportunities in other states and other tax systems. No one can believe the situation will improve. The responsibility to act is ours.

An important part of our obligation as lawmakers is to continually reexamine our laws, to reassess whether changed circumstances should lead to changes in the law. It is appropriate for us to hold a law up to continuing scrutiny, by asking several questions: First, would this law, if proposed today, be enacted? Second, does this law continue to fulfill a necessary purpose? Third, is the law being interpreted and implemented in a manner consistent with its intent? And fourth, as to laws that provide special exemptions or privileges to a limited few, do circumstances continue to justify the particular advantages granted by the law?

I believe, Mr. Chairman, that the anti-tax discrimination provisions of the 4-R Act do not stand up to these questions. You and I both know, Mr. Chairman, that the majority of Nebraskans share that view. And these hearings are evidence of the deep and abiding concern you have already expressed to me.

The railroads today, as I have said, are in their vitality and business acumen indistinguishable from most American business. The blatant tax abuse that occurred in some quarters—not in Nebraska, I might add—in the era before the 4-R Act has long since passed from the scene. It is fair to say that if this law were in the form of a bill pending before this Committee today, it would most likely not be enacted. If it wouldn't pass, then we should consider repealing it.

Mr. Chairman, I know you understand the need for prompt, thorough action. I understand that next Tuesday, the full Commerce Committee will be holding its final meeting of this Congress, and therefore, will prevent the Committee with its last opportunity to legislatively address what promises to be a continuing and growing problem. I also understand that rail reform legislation may be considered in that meeting. I urge the Committee, if it considers rail reform legislation, to include provisions that will alleviate the state tax problem. Perhaps outright repeal is not necessary. At a minimum, however, railroads ought not to be able to argue that discrimination exists in a taxing scheme that passes Constitutional Commerce Clause and Equal Protection tests. Absent a showing that egregious abuse by the states continues to occur, the railroads ought to observe the provisions of the Anti-Injunction Act as all other industries do. Finally, state appeals ought to be exhausted before resort is allowed to the federal courts.

I and the people of Nebraska appreciate the thoughtful attention you and the members of the Committee have given this problem, Mr. Chairman. I hope that you will have the opportunity to ease the burden created by an otherwise well-intentioned, but perhaps Section of the law—Section 306(1)(D) of the 4-R Act.

Thank you, Mr. Chairman.

STATEMENT OF HON. ROSE MOFFORD, GOVERNOR, STATE OF ARIZONA

My name is Rose Mofford. I am the Governor of the State of Arizona. It is a pleasure to provide comments to the Surface Transportation Subcommittee upon the serious problems caused to Arizona's system of property taxation by the railroad by the railroad industry under the 4-R Act. The members of the Subcommittee may not be aware that the Arizona Territory has played a pivotal role in the development of the railroad industry in the Western United States since the 19th Century. The Arizona Territory provided the only feasible route for connecting the ports of entry along the Mississippi River and the Gulf of Mexico to the Pacific Coast along a southerly route. Indeed, that was the very reason for the acquisition of the Gadsden Purchase by the United States Government in 1853.

While the railroad industry has always played an important part in the developing economy of the State of Arizona, the railroad industry has become an ever diminishing part of my State's tax base. However, the disruption to the State's tax base and the orderly collection of property taxes for fiscal purposes has been repeatedly disrupted by litigation under the 4-R Act. That disruption has been out of all proportion to the declining importance of the industry in the State's tax base, and this situation has required the State to devote huge legal and monetary resources to such litigation, which would be better spent elsewhere. We are concerned that this problem will become even more aggravated if present proposals to expand the scope of the 4-R Act to other industries become law. We are concerned that this problem will become even more aggravated in the future, unless the Congress places reasonable restraints against indiscriminate use of injunctive relief against this State's tax collection officers by the federal courts. We believe that unless the Congress puts reasonable limits upon the 4-R Act jurisdiction in respect to railroad valuation, the intrusion of the federal courts into this State's property tax system will cause an intolerable burden to this State and will seriously disrupt the orderly system for property valuation, levy and assessment of property taxes. In Arizona there are over 200 public school districts throughout the State covering cities, counties, towns, federal military bases, federal preserves, such as national forests, national parks and Indian reservations. The property tax base is the principal financing mechanism for public school education in Arizona and public education is the principal victim of litigation under the 4-R Act in Arizona.

I would like to give you a few recent examples of Arizona's experience in railroad litigation under the 4-R Act. Since the 4-R Act went into effect in 1980, Arizona has enacted laws and undertaken extensive programs of property equalization in order to fulfill its responsibility to ensure that railroad transportation property was assessed at the same level as all other commercial and industrial property in the State.

In 1983 the federal court issued an order enjoining discriminatory assessment practices under the 4-R Act. Ultimately the issues were settled, thus culminating several years of litigation by both major railroads of suits filed in both state and federal court.

After that experience, the State redoubled its efforts to do a better job and I am proud to say that we have done so. In 1986 both major railroads reinstituted litigation against the State under the 4-R Act. This time, however, the U.S. District Court denied any injunctive relief and specifically ruled that the State had not discriminated against the railroads either as to property equalization or as to railroad valuation. The railroads appealed from the federal court's decision after the court had denied their injunction on the merits. The railroads were able to obtain an injunction pending appeal. The Arizona public schools, like all political subdivisions of the State, must budget and levy taxes before the third Monday in August of every calendar year. Thereafter, tax bills are prepared by the 15 county treasurers and sent to the owners throughout the State for some two million parcels of property. Those taxes become due and payable on October 1. The tremendous harm and burden to our schools principally was that the injunctive relief was granted to enjoin the collection of taxes that were already budgeted and needed by the school districts. In many school districts, the railroad industry is a major taxpayer and the burden on the districts due to the injunctive was quite large. If other industries obtain the benefit of 4-R Act type legislation, the burden of such injunctions would threaten the very existence of our system of public school education in Arizona.

All of this tremendous burden and harm to our schools could be mitigated if the Congress were to remove the provision for injunctive relief in the federal courts under the 4-R Act. Arizona provides a panoply of administrative and judicial remedies to provide refunds, plus interest, to any taxpayer in the State, including the railroad industry for excessive or discriminatory property taxation. Each and every

tax year, taxpayers throughout the State apply for and receive such refunds, and the railroads are no exception.

Arizona is a state that gives property tax valuation cases a priority, thus providing for the expeditious handling of such cases. In addition to refunds with interest, the state awards reasonable attorney and expert witness fees to successful litigants. Under these circumstances, the railroad taxpayer is very adequately protected and really does not need a procedure for federal relief by means of injunction.

Fortunately for our schools, the Legislature promptly passed a special appropriation for the 200 school districts of Arizona to enable the schools to continue operating while the railroads appealed the federal court's dicision denying all relief on the merits of their case. Within a couple of Arizona settled the litigation. As a part of the settlement, the railroads acknowledged that Arizona's method for insuring that railroad property was assessed at the same level as other commercial property in the State was in full compliance with the 4-R Act.

It is particularly distressing to me that the harmful effect of such injunctions must necessarily fall on the shoulders of the school children of this State. Mr. chairman and Members of the Subcommittee, I would like to believe that all of you share my feelings that the disruption caused to our public school system should weigh far more heavily in the scales of justice than the pecuniary interest of the railroad industry. Yet under the present version of the 4-R Act, the scales of justice, at least in the federal courts, are weighted exactly the opposite. Deletion of injunctive relief as a remedy under the 4-R Act would balance the scales of justice with no harm to the railroad or other industries affected by the 4-R Act.

The tendency of the federal courts is to extend the reach of the 4-R Act and intrude ever further into the State's fiscal affairs. This tendency toward everbroader interpretation only emboldens the industry and provides the industry a legal incentive, to abandon the standards of public responsibility to which other industries not under the jurisdiction of the 4-R Act adhere. That aspect of the situation, I would respectfuly submit, Mr. Chairman, and Members of the Subcommittee, is probably the most threatening aspect of the 4-R Act to local governmental functions. The industry has little or no incentive to bargain in good faith with the State or its taxation representatives because the industry knows that if it cannot get what it wants from the State, then the industry can use a United States District Court injunction to hammer out a favorable property tax settlement.

We think this is unfair to the People of our State. We do not think this was intended by the United States Congress when it passed the 4-R Act in 1976. We do not believe that such extreme relief is justified. We believe that Arizona does not engage in unfair discrimination against the railroad industry and in fact the federal district court so held in 1986. After nine years of 4-R Act experience, we believe it is time for the Congress to review the 4-R Act experience, we believe it is time for the Congress to review the 4-R Act experience, we believe it is time for the Congress to review the 4-R Act and related legislation in its entirety. We urgently request the Committee to consider placing reasonable and appropriate limitations upon the jurisdiction of the federal courts to provide relief to railroads and other industries that come under the scope of the Act.

The recent extension of the 4-R Act by judicial construction to concern the methods and techniques of valuation will so involve the federal courts in this State's, and every State's, system of property valuation that we will in effect have two property tax systems. A federal system will apply to some industries and a state system will apply to all other property. After many years of litigation, in both state and federal courts, the railroad industry has failed to develop a uniform method of railroad valuation. Indeed, the industry itself has not been in agreement.

After the industry settled the railroad cases in 1987 that I spoke of earlier, Arizona's taxing authorities met with their representatives in order to attempt to arrive at some acceptable method for property valuation for railroad transportation property. It was amazing to us to find the railroads could not agree among themselves on the proper method of railroad valuation. The State had initiated these meetings and had settled the railroad cases in hopes that a settlement would "clear the air" and create a suitable environment for meaningful discussions with the industry. Like many states, Arizona must adopt rules and regulations after public hearings and publish those rules and regulations for its system of taxation. The State had previously adopted rules in 1986 for the valuation of railroads, telecommunications, pipeline properties and mining property. The purpose of these meetings was simply to devise specific methods for railroad valuation that would be acceptable to the industry and consistent with sound appraisal methods and techniques.

I am sure Mr. Chairman, and Members of the Subcommittee, you share our concern that the railroads could not even agree among themselves on proper railroad valuation methodology.

A major reason for the railroads lack of cooperation we feel, is that under recent federal case law the 4-R Act has been extended to cover questions of railroad valuation. The railroad industry has no incentive to work with this or any other State on this issue. The railroad representatives know that they can proceed directly to federal district court if they do not like their assessed value.

I come before you today to ask the congress to correct the situations I have described and place appropriate boundaries upon the jurisdiction of the federal courts under the 4-R Act. As the decision of the federal district court in 1986 has shown, Arizona is entirely capable and willing to remove all vestiges of discrimination under the 4-R Act. If the recent trend in the federal courts to liberalize and extend the Act is not halted, we will see the development of two taxing systems, in which the federal courts become the highest taxing tribunal for some state and local taxation matters. Such a development will result in preferential taxation for the railroad industry and any other industry that may be included in the Act. The final result would be to institutionalize a system of taxation for interstate transportation properties that discriminates against all other commercial and industrial property taxpayers in the State of Arizona that are subject to the market value standard.

The railroad industry obtained passage of the Railroad Revitalization and Regulatory Reform Act of 1976 by the claim that their industry was grossly discriminated against by the States in the administration of their property taxes and that this discrimination seriously jeopardized their ability to function as railroads. Although some discrimination against railroads has occurred in the past, the figures from this State indicate that the extent of the discrimination has been exaggerated. One of the indications that the railroads exaggerated their State tax problem is the fact that in 1976, the year of passage of the 4-R Act, State property taxes were less than 2 percent of railroad operating revenues. Another indication of the exaggeration of the problem is the comparative figures of railroad assessments to total property tax assessments in Arizona. In 1930, railroad assessments constituted approximately 16 percent of total property tax assessments in Arizona. By 1987, railroad assessments constituted approximately 0.16 of 1 percent of total property tax assessments in Arizona.

As of January 1, 1988, the dollar was worth only approximately $.15 in terms of the purchasing power of the 1930 dollar. In spite of this tremendous inflation, we did not have a corresponding increase in railroad valuations. For example, in 1930 the Atchison, Topeka & Santa Fe Railroad had a full cash value of $43,153,742, whereas that same railroad had a full cash value of $105,300,000 in 1988. In 1930, the Southern Pacific Transportation Company had a full cash value of $63,804,050 while the full cash value of that same railroad in 1988 was only $103,200,000. Actually, at various points in time after 1930, the railroads had lower values than they did in 1930.

These figures demonstrate that the railroad's position in the tax base has declined. If the railroads had not declined, then considering inflation one might expect their total values in Arizona now to be in the neighborhood of $650 million instead of $200 million. It is not reasonable to believe that the well maintained Arizona railroads have experienced a more than 300 percent decline in values since 1930. Rather these figures suggest that the railroads in Arizona have been conservatively valued for tax purposes. Yet the railroads continue their efforts to drive Arizona railroad values down.

Legislation providing for substantially the same relief as the 4-R Act has been introduced for pipelines and also for telecommunication companies. Railroads are a relatively small portion of the assessed properties in Arizona, but the telecommunication companies and the pipelines are a much larger portion of the property tax base. If the present trend continues, utilities will be the next industry to have a bill introduced in congress for their relief from State property taxes. This legislative trend is producing two distinct systems of valuation. One system is valuation of major interstate industries by U.S. District Court Judges and the other system is the valuation of small local businesses by county assessors. It is unlikely that the two systems will produce equitable results. If other industries are included in the 4-R Act and are thus able to go into the United States District courts and obtain injunctions as the railroads have done, when only valuation issues are involved, the ability of local governments to provide essential government services will be seriously jeopardized. The other possible effect of such legislation is that there will be a massive shift of the tax burden from those taxpayers who have the right to adjudicate their property tax in U.S. District Courts to local businessmen, residential

property owners and farmers who have to live with market values instead of experts conjectures of market value.

In closing, I thank you again for this opportunity to speak to you again on this issue of manifest public importance to the people of Arizona. I promise our full support, and the support of the Arizona delegation, to assist you in developing appropriate amendments and restrictions to the 4–R Act.

Statement on Behalf of the National School Boards Association

A. INTRODUCTION

I am Christopher Dudley, Executive Director of the Oregon School Boards Association, Salem, Oregon. I am pleased to have this opportunity to testify before the Senate Subcommittee on Surface Transportation.

NSBA is the only major education organization representing the over 95,000 locally elected and appointed school board members across the nation. Currently marking its forty-ninth year of service, NSBA is a federation of state school board associations, with direct local school board affiliates, constituted to strengthen local lay control of education and to work for the improvement of education. Nationwide, local school board members are politically accountable to their constituents for the prudent operation and fiscal management of the local school districts they serve. As unsalaried governmental officials, school board members are uniquely positioned to judge federal legislative programs purely from the standpoint of public education, without consideration to their personal professional interest.

Mr. Chairman, because our time before the Committee is limited, I shall briefly address the impact of the Railroad Revitalization and Reform Act on local public school districts and request that NSBA be allowed to submit additional testimony in the form of an extension of these remarks.

B. PUBLIC EDUCATION IS FUNDED BY LOCAL REAL PROPERTY, STATE PERSONAL PROPERTY, AND STATE/LOCAL SALES TAXES

In general, local public school districts rely on a combination of local real property, state personal property, and state/local sales taxes to fund the operation and management of public schools. Moreover, in a majority of jurisdictions, real property taxes imposed at the local level are the sole source of funding for the construction of new facilities, the renovation or re-design of existing facilities, and school district response actions undertaken to comply with unfunded federal environmental mandates (e.g., asbestos, lead in the drinking water, radon, and underground petroleum storage tank financial responsibility provisions).

C. LOCAL SCHOOL DISTRICTS OPERATE ON A FISCAL YEAR, BALANCED BUDGET CYCLE

Not unlike other units of state and local government, local public school districts are required by law to operate on a fiscal (July 1 to July 1), rather than calendar year, balanced budget cycle. Furthermore, in a typical school district, no less than 80 percent of the annual budget is obligated to pay the fixed costs of public education (employee salaries and benefits, student bus transportation, heat, utilities, and routine building maintenance). Because this is so, any reduction in revenues generated by taxes earmarked for public education has an immediate and significant impact on existing education programs and the students those programs serve.

D. CURRENT IMPACT OF THE RAILROAD REVITALIZATION AND REFORM ACT ON LOCAL PUBLIC SCHOOL DISTRICTS

The impact of the Railroad Revitalization and Reform Act on local public school districts is threefold. First, in those states in which the railroads have filed for injunctive relief to enjoin the taxing authority from collection of current year taxes, local school districts have been forced to cut or cancel educational programming and discretionary spending for education, often in the middle of the academic year and without recourse to supplemental revenues.

Second, in those jurisdictions in which the taxing authority is enjoined from collection of disputed taxes pending a railroad property valuation by the federal court, local school districts have been forced to seek additional tax revenues from other taxpayers to compensate for the revenue shortfall. However, because property tax increases are generally subject to voter approval during a general election, it is often not possible for a local school district to access these revenues until the following academic/fiscal year.

BEST AVAILABLE COPY

Third, by its very nature, the injunctive relief routinely granted to plaintiff railroads under the Railroad Revitalization and Reform Act at once undermines the predictability of school district budgets and the fiscal integrity of local public school districts.

For example, local public school districts issue more tax-exempt general obligation bonds than any other single unit of state or local government. In a majority of local school districts, the pledged security for repayment of the tax-exempt debt is revenue generated by the local real property tax. Any action which diminishes the predictability of revenues generated by real property taxes results in a devaluation of the underlying security. Thus, when a federal district court grants injunctive relief to a railroad under the Act, the result is not necessarily confined solely to an immediate diminution of the underlying security pledged by the school district. Rather, it may also diminish the borrowing power of the school distict as well as their tax-exempt rating.

E. CONCLUSION

Nationwide, local public school districts have traditionally relied on the local tax base to fund public education at the local level. Over the past decade, in addition to its function as a purveyor of educational services at the elementary and secondary school level, local school districts have been the object of a series of unfunded non-educational federal mandates, the cost of which must be borne by the local taxpayer and the local tax base. Because this is so, local school districts must be able to rely on the predictability of both the local tax base and the local revenues generated by local property taxes. The injunctive relief currently available to railroads under the Railroad Revitalization and Reform Act undermines this essential element of predictability.

For example, local school districts are currently required to take immediate action to address the presence of asbestos in school buildings. The Environmental Protection Agency has issued a conservative nationwide cost estimate of school district compliance with the Asbestos Hazard Emergency Response Act (AHERA) as $1 billion. A local public school district which fails to take immediate action to comply with AHERA faces civil penalty of up to $5,000 per day for each day of noncompliance. The fact that the school district is unable to finance the cost of the activity—without abrogating its primary education function—because it is prohibited from collection and expenditure of escrowed disputed property taxes from one of the largest property owners in the school district would not be a defense to a school district's failure to comply with AHERA.

Therefore, NSBA asks this Committee to carefully examine the far-reaching and negative impact that certain provisions in the Railroad Revitalization and Reform Act have had on local public school districts. Moreover, NSBA would like the opportunity to work with the Committee to ensure that the state and local property tax system discriminates against no taxpayer, and that the Railroad Revitalization and Reform Act does not discriminate against public education and the 40 million students that local public school districts serve.

STATEMENT OF N. RHINEHART, JR., CORPORATE VICE PRESIDENT—TAX PLANNING AND COMPLIANCE, AMERICAN TELEPHONE & TELEGRAPH CO.

My name is Pete Rhinehart and I am the Corporate Vice President-Tax Planning and Compliance for American Telephone & Telegraph Company. I appreciate the opportunity to present the views of AT&T with respect to the administration of state and local ad valorem taxation.

AT&T is a provider of nationwide domestic and international long distance telecommunications services for both voice and data applications. As such, it has communications facilities located throughout the United States that are largely devoted to interstate service. Thus, AT&T is directly affected by the ad valorem tax practices of every state in the country and has first-hand knowledge of discriminatory tax schemes employed by certain states. We share the concerns of the natural gas pipeline industry ("pipelines") that such taxation is a significant detriment to interstate commerce. Further, we agree that federal legislation is required to provide an adequate legal remedy to address the situation.

The legislation proposed in H.R. 2953 would prohibit discriminatory ad valorem taxation by state and local government entities with respect to the pipelines. Further, it would provide access to the federal courts whenever the pipelines' property is taxed at a significantly higher level than other commercial and industrial property. We strongly support this legislation and urge its expansion to include interstate

telecommunications property, as the only practical method to eliminate discrimination at the state and local level. This is the case because many states have passed statutory and constitutional measures authorizing their historical discriminatory tax practices, thereby making it impossible to obtain relief using available state remedies. As a result, long distance customers nationwide are paying inflated rates due to the discriminatory tax practices of a limited number of states. Federal legislation is essential if this burden upon interstate commerce is to be eliminated.

DISCRIMINATORY TAXATION OF INTERSTATE PROPERTY SHOULD NO LONGER BE ADDRESSED PIECEMEAL

Of the five industries primarily involved in interstate activities—interstate railroads, interstate trucking, interstate air carriers, interstate pipelines and interstate telecommunications—federal law already protects the first three industries from discriminatory state taxes. It would thus be inappropriate to enact federal legislation for the pipelines without also including the last industry, long distance telecommunications. This is particularly so because long distance telecommunications companies in general are subject to the same discriminatory ad valorem taxation that the pipelines seek to eliminate. Of the eleven states identified by the pipelines as having discriminatory tax practices with regard to their industry, seven states tax AT&T under the identical discriminatory tax code provisions. Although AT&T pays discriminatory taxes in eighteen states, those seven states represent in value almost 60 percent of the total cost of the discriminatory tax practices with regard to AT&T and its customers (excluding New York, where the discriminatory tax is being phased out by state legislation). Further, pipeline and long distance telecommunications companies are generally assessed by the same state taxing authorities, using the same methods, and are restricted to the identical legal remedies.

This common treatment of pipelines and long distance telecommunications companies derives from the same historical reference: both have been generally included for property tax purposes among a group of businesses defined as "public service companies" or "public utilities." As such, they are typically assessed by state agencies such as departments of revenue or state boards of equalization. This differs from the administration of property taxes for general commercial and industrial businesses, which are assessed by local county and municipal assessing officials. The reason for this differentiation is that so called public service property is generally located in a large number of taxing jurisdictions; therefore, it is administratively efficient to have a centralized authority, rather than local bodies, charged with assessing all of the property of each company. Inequities arise only when state assessed property is required to bear a greater than proportionate share of the state and local ad valorem tax burden.

This is precisely what has occurred. Over time, inconsistent assessment practices have brought about a substantial disparity between the valuation levels of state assessed property and property assessed at the local level in certain states. Typically, property assessed by local authorities was assessed infrequently or at a much lower ratio of assessed value to fair market value than that of state assessed property. For example, the state of Wyoming's local appraisers last reappraised the real property of other commercial and industrial taxpayers in the late 1960's, while the properties of public service companies that are valued by the state assessing authority are revalued every year. As the disparities became more obvious, the de facto discriminatory tax structure was typically converted to a de jure scheme through administrative and statutory policy changes, thus perpetuating the discrimination and eliminating available legal remedies at the state level for public service companies, including both pipelines and long distance telecommunications companies.

THE EFFECTS OF DISCRIMINATION ARE UNTOWARD

(1) The taxes are exported to residents of other States:

A major effect of the discrimination is that customers in other states ultimately bear much of the cost. With respect to AT&T, the cost is paid equally by all AT&T long distance customers, despite the fact that only the residents of those states imposing discriminatory taxes receive any benefit from the associated tax receipts. (As with the pipelines, tax exportation occurs because AT&T's interstate rates are established on a national basis and are applied uniformly across the country.) Because much of the cost of discriminatory property taxation is paid by customers outside the taxing state, such taxation is clearly inappropriate; indeed, elimination of this inequity was a major reason for laws prohibiting discrimination for other industries.

These exported costs are significant for AT&T and its customers. Long distance telecommunications (and pipeline) companies are generally included in the highest

assessment ratio categories, where the magnitude of the difference between property classes is often substantial. For instance, in Ohio the personal property of AT&T (and the pipelines) is assessed at 100 percent of fair market value, whereas the personal property of the typical commercial and industrial taxpayers is assessed at 30 percent of fair market value. As a result, AT&T's tax burden in Ohio is three times the burden of other commercial and industrial taxpayers for the equivalent property. All totaled, some $37 million of AT&T's $210 million 1987 ad valorem tax liability was directly attributable to state discriminatory tax practices (excluding New York, whose legislature recently passed a bill phasing out its discriminatory tax).

(2) Competition is impeded:

Another effect of the discrimination is that it hurts AT&T's ability to compete with providers not subject to discriminatory taxes. These discriminatory tax schemes primarily arose in an era when public service type companies were regulated monopolies. At the time, AT&T was the only provider of nationwide long distance telecommunications service, and higher levels of taxation were passed along to the customers automatically in the form of higher rates. In today's environment, over 500 domestic long distance telecommunications companies offer services to customers in an intensely competitive market place. In addition, long distance companies face significant competition from firms that provide alternatives to the public networks and escape discriminatory taxation. The number and size of these private networks, often constructed originally to meet internal needs, has increased dramatically in recent years removing large volumes of business from the public networks. General Motors, Sears, and Westinghouse are examples of companies that currently offer various long distance telecommunications services in direct competition with long distance telecommunications companies, yet do not pay discriminatory taxes.

Therefore, even assuming that it was once reasonable to subject the interstate long distance telecommunications industry to a more onerous level of ad valorem taxation than competitive business, it is no longer justified or reasonable in the current competitive environment. Further, the distinction between telecommunications companies and other high technology enterprises is more difficult to establish, due to the variety of vendors now competing in the movement and management of all types of information. The Federal Communications Commission recognized this change in their Computer Inquiry II decision in which they said "The computer industry and the communications industry are becoming more and more interwoven. We believe, and the record shows that this trend will become even more pronounced in the future." Thus, a disparate tax system that went largely unnoticed in a previous era now places certain long distance telecommunications companies such as AT&T at a competitive disadvantage and subjects customers to a higher cost relative to alternative forms of information movement and management that are not burdened by discriminatory taxation.

STATE REMEDIES ARE INADEQUATE

Discriminatory ad valorem assessment practices are difficult, if not impossible, to change using existing state law and state remedies. De jure classification systems, sanctioned by state constitutional provisions which authorize reasonable classification, are virtually immune from attack. The United States Supreme Court has frequently supported the broad power of the states to classify accordingly to occupation for the purposes of taxation. See *Walters* v. *City of St. Louis, Mo.,* 347 U.S. 231 (1954), *Nashville C. & St. L. R. Co.* v. *Browning,* 310 U.S. 362 (1940).

Judicial challenges to de facto classification schemes, that is those without state constitutional sanction, sometimes have been more successful, but only temporarily. For example, in *Weissinger* v. *Boswell,* 330 F. Supp. 615 (M.D. Ala. 1971), the court found that Alabama's practice of applying varying assessment percentages to different classes of property conflicted with the Federal Constitutional guarantee of equal protection, but only because of the State's Constitutional requirement of uniformity in assessment. Similar holdings invalidating state assessment practices were reached by the Georgia State Supreme Court *(Undercofler* v. *Seaboard Airline Railroad Co.,* 22 G. 882, 152 S.E. 2d 878 (1966) and the Wyoming Supreme Court *(Rocky Mountain Oil and Gas Association et al* v. *State Board of Equalization et al,* case No. 87-194, December 31, 1987.) AT&T was one of the plaintiffs in the *Rocky Mountain Oil and Gas Association* case and one of a number of major "utility" taxpayers challenging the de facto classification system in Georgia.

Success in the courts has not resulted in changes in the discriminatory tax schemes, however. In Georgia, for example, one of the other taxpayers, Georgia Power Company, obtained a decision in its favor from a hearing examiner appointed by the State Board of Equalization in August, 1987. To date, the State Board of

Equalization has not acted on the recommendation of the hearing examiner and the issue remains unresolved. More often, "successful" challenges to de facto classification systems ultimately turn out to be unsuccessful, because court decisions are often undone by the State legislatures. In response to the recent decision in *Rocky Mountain Oil and Gas Association*, the Wyoming Legislature has passed a bill providing for a de jure classification system. The result will be to legitimize the disparity between the assessment ratio applicable to state assessed properties and the ratio applicable to locally assessed properties, which had existed de facto heretofore. The response of the Georgia State Legislature was to pass a bill providing for local assessment of the property of long distance companies and for local appeals of these assessments. The effect will be to make future challenges to discriminatory assessment practices administratively much more difficult. A company such as AT&T which does business in all of the over 100 counties in the state, will have to maintain separate equalization cases challenging de facto discrimination in each county. This is administratively impractical and further demonstrates the real need for federal legislation.

CONCLUSION

In summary, discriminatory taxation of interstate commerce represents a significant problem for the long distance telecommunications industry and its customers to whom the taxes are exported. Further, dramatic changes have taken place in recent years that tend to exacerbate the impact of such taxation. These changes include transformation of an industry once primarily concerned with voice telecommunications to one involved in all forms of information movement and management. The current long distance industry has long since departed the monopolistic era on long distance telecommunications service. In the current environment, competition among providers of public long distance service is intense. In addition, there is significant competition from outside the industry in the form of private Networks and other alternative means of transporting information. In a competitive environment such as this, it is essential that tax policy not be perpetuated in a manner that increases costs for one type of competitive product or service to the competitive advantage of others. Federal tax policy should require that natural competitive forces be allowed to function with regard to interstate commerce unimpeded by disparate tax treatment. Moreover, at the present time, legal remedies are inadequate to effectively address the situation. Congress has previously recognized these legal deficiencies through passage of federal legislation that has provided effective remedies in the case of railroads, motor carriers, and airlines. Similar action is justified for the long distance telecommunications companies. We therefore strongly support the legislation set forth in H.R. 2953, and ask that the long distance telecommunications industry be included in the legislation.

STATEMENT OF THE AMERICAN MOVERS CONFERENCE

The American Movers Conference (AMC) submits these comments in response to the hearing on state taxation of interstate transportation before the Subcommittee on Surface Transportation of the Commerce, Science, and Transportation Committee, held September 16, 1988. We request that additional hearings be held on this topic.

INTRODUCTION

We welcome the opportunity to present our comments and wish to express our appreciation to the committee for considering the ever increasing tax burdens that the states are placing on interstate motor carriers. This issue is extremely important to the household goods moving industry.

The AMC is a national trade association that represents the household goods motor carrier industry. The AMC represents over 1,500 movers, including van lines, agents affiliated with van lines, and independent movers. AMC is affiliated with the American Trucking Associations, Inc., (ATA). Although the AMC supports the views expressed in the testimony of the American Trucking Associations, Inc., the household goods moving industry is different in its structure and operation from other segments of the trucking industry. These comments will provide examples of how the household goods movers are particularly subjected to burdensome state taxes.

The structure of the moving industry is unique in that three separate businesses operate simultaneously—the driver, the agent, and the van line. Each has the potential for deriving income and being taxed on each moving job. As a result, some states are applying triple taxation on the total income from the job.

Movers as a group are more heavily impacted than other types of trucking because they are largely comprised of motor carriers with single vehicles that operate on irregular routes in potentially all 48 continental states.

While the household goods moving industry is made up of moving companies of all sizes, the top six van lines and their agents account for 73 percent of the gross revenue in the entire household goods moving industry, including both interstate and intrastate operations. The top ten van lines account for 83 percent. Considering that the consolidated moving systems encompass at least 5,000 agents and 26,000 owner-operators, the majority of movers are small businessmen.

Unlike regular common carriers that transport goods from a warehouse in one state to another along a fixed route day after day, every pick-up and delivery of household goods follows a unique route determined by the individual shipper's origin and destination. As a result, out-of-state movers (the van line, agent, and independent contractor) are potentially subjected to local and state tax laws at the point of origin, point of destination, and all states and communities in route.

Movers are being plagued by state and local governments, not only in the area of income/franchise taxes, but also for sales and use taxes and property taxes. This focus results from misunderstanding the relationship between the van line, agent and independent contractor and from the fact that movers come in contact with so many taxing jurisdictions.

The household goods movers are probably the segment of the trucking industry hardest hit by the lack of uniformity in state tax application and collection systems. The states and local municipalities are imposing new administrative and fiscal burdens on this small-business oriented industry. We urge your committee to consider our recommendations.

OVERVIEW OF PROBLEMS

Each year as the states are faced with increased demands for revenue and decreased Federal assistance, state taxing policies emerge with a new twist and very likely with a new urgency. In their effort to identify new sources of funding for the state treasury, AMC has seen an increasing number of states and their political subdivisions attempt to collect taxes from out-of-state movers in order to fund the demands for public services totally unrelated to transportation.

The states are levying many types of taxes. Taxes labeled variously as franchise, gross receipts, and single business taxes are all essentially income taxes. In addition, states are trying to levy sales and property taxes on out-of-state businesses.

Even worse, the states are imposing these taxes retroactively. Small businesses, often individuals, who have no direct contact with states are being assessed not only for the taxes, but for nonfiling penalties and late fees.

Recent efforts by the states to tax movers is placing impossible administrative burdens on small movers. Small movers should not have to file tax returns in all continental 48 states. Most small movers cannot comprehend all the state tax laws that potentially impact their business, nor can they afford the expertise to comply.

INDUSTRY ORGANIZATION

A consolidated household goods moving system generally encompasses three elements:

1. A vanline company that is an authorized interstate carrier.
2. Agents who independently own and operate local moving companies and who may also have their own interstate authority. Agents are either affiliated with a van line or are "independent" interstate carriers who operate nationwide systems without an established agency network, and depend on independent owner-operators to perform many of the accessorial services provided by vanline agency companies.
3. Long-haul van drivers who are either employees of a van line or agent or independent contractor truck operators.

Although moving systems may function somewhat differently, the differences are all variations on the same theme.

Van line systems are cooperatives that developed partially in response to federal regulation and partially so that a multitude of small transportation businesses could survive and prosper in spite of their seasonal, irregular traffic patterns. The federal requirement that interstate motor carriers have interstate operating authority granted by the Interstate Commerce Commission in order that there was an identifiable, authorized carrier responsible under federal public liability and safety regulations was the genesis over 50 years ago for the establishment of our nationwide agency systems.

Until deregulation in 1980, operating authority was very difficult to obtain. By affiliating with one or more carriers that had interstate authority, local mover agents could operate their own independent intrastate business and, in addition, have access through a nationwide van line system to other business opportunities without having to expend the capital necessary to market or operate equipment throughout the country. In the same manner, an independent contractor owner-operator had available to him coordinated dispatch systems that offered shipments of various sizes throughout the country, with no effort on his part required to arrange for a back haul after he delivered, except for making a phone call to a carrier or agent with the hope that he wouldn't have to wait too long to locate another load.

EXAMPLES OF STATE INCOME/FRANCHISE TAXATION

Ohio

In 1986, the state of Ohio reinterpreted its tax law and attempted to collect income tax from every mover that had come within the state's border since 1972. In order to collect a pro rata share of tax on any business that "owns or uses any portion of its property in Ohio or does business in Ohio," the state anticipated sending out 25,000 tax assessment notices retroactive to the year 1972. Had Ohio succeeded, every mover, including drivers, would have had to file 15 years of Ohio state tax returns retroactively, and pay the taxes and penalties. Then, they would have had to file amended returns and request refunds in their base state in order to show the appropriate prorated share of taxable income. However, they would have been penalized additionally because they could not have requested refunds in their base state except for years still open for changes (usually 3 years). They would have no relief for the excess taxes paid to their base state in previous years.

In response to complaints from our members, the AMC negotiated with the state on behalf of the affected movers. The State of Ohio ultimately agreed that only those movers that operated 25,000 miles or more in the state each year would be subject to state taxation, and the tax would apply retroactively from 1983 forward. In addition, the state agreed to abate all penalties and only charge 50 percent of the statutory interest rate.

While the state of Ohio was willing to cooperate with the movers in order to reach a more equitable resolution without litigation, other states have not been as responsive.

Maryland

The state of Maryland is trying to collect income taxes from owner-operator truck drivers who live outside of Maryland, but lease their tractors for use by a Maryland company that is an agent of an interstate van line. We have attached [1] correspondence between the Maryland Comptroller's office and one of our members, Greenmount Moving and Storage, an agent for Wheaton Van Lines, that illustrates the problem.

We are concerned that state tax collection efforts like this against drivers will add fuel to the growing driver shortage. Truck drivers, especially long-haul drivers, are critical to the continued operation of the household goods moving industry. But, if the states force drivers to file tax returns in every state in which they drive, truck drivers will find other occupations. Even if their total tax liability did not increase over the amount now paid to their resident state, the administrative burden of proration and multiple filings will force them out of the business.

Michigan

Following Ohio's lead, the state of Michigan decided in 1988 to levy its Michigan Single Business Tax (an income/franchise tax) on all three elements in the moving system: the van line, agent, and the individual drivers. Michigan wants to apply the tax retroactively from 1981 forward and assess a 100 percent tax penalty for failure to file returns, along with the full interest amount. As of this writing, the state is taking a very hard line; it has issued jeopardy assessments against out-of-state movers who have no interstate operating authority. For example, the state is taxing an agent on income derived by the van line because a vehicle owned by the agent moved through the state, even though the agent's vehicle was being operated in the service of a van line, on the van line's operating authority—and even though the

[1] The exhibits attached were not reproducible.

agent had no interstate operating authority and therefore could not have operated the vehicle in the state.

New York

The State of New York recently informed the AMC that it is going to resume efforts to ensure that out-of-state household goods movers file a New York state franchise tax by applying a gross receipts tax on all companies transacting business in New York. "Transacting business in New York," may mean that a driver, who merely passed through the state of New York in connection with a move between two other states will be subjected to retroactive taxes and penalties.

Here again the state is taxing the same transaction—the move—three times by taxing the gross receipts of the van line, agent, and independent contractor. Using the state's proposed tax scheme, this "triple taxation" would result in the state's collecting taxes on more than double the gross receipts from the original transaction. One reason for this result is that, by definition, a gross receipts tax does not allow any deduction for expenses. In the following example, in which the total cost of a move to the consumer was only $1,000, and did not involve a pick up or delivery in New York, the state of New York would be attempting to collect tax, penalties, and interest on $2,250:

Consumer pays van line for move	$1,000
Van line pays agent	750
Agent pays driver	500
	2,250

How can a state like New York tax an out-of-state agent, located in California, who has no ICC operating authority but is merely affiliated with a national van line network? How can the state tax the independent contractor driver who is not even affiliated with the national vanline?

Virginia and Wisconsin

The AMC has been informed that both Virginia and Wisconsin are actively expanding their nexus program

Over the years, states periodically institute "nexus" programs by which they attempt to justify taxing out-of-state companies. The state first defines what constitute "doing business" for a particular industry, and then heightens tax enforcement against that industry using its new arbitrary definition. For example, a mover might be considered to be "doing business" in a state if the company made six pick-ups or deliveries in the state in one year. The state then levies a state franchise tax on the mover. The mover must pay or litigate. These alternatives are both burdensome.

SALES TAXES

Illinois

During the past several years non-Illinois based movers have experienced difficulty with the Illinois Department of Revenue and the local jurisdictions in connection with items subject to sales and use taxes; for example, packing materials. The problem arises because under Illinois law too many different governmental agencies can levy a sales tax. The state currently collects a state, local, mass transit, county supplemental, and county water commissions tax.

Massachusetts/Connecticut

A few months ago, AMC was notified by several small movers that the states of Massachusetts and Connecticut have begun performing extensive audits in an effort to detect any failure to file and pay sales tax on cartons, boxes, and other packing materials used in interstate moves. It is questionable whether these states can constitutionally tax these items used in interstate commerce. Yet these states are not only attempting to collect these taxes, they are applying the taxes retroactively for 3 to 10 years.

PROPERTY TAXES

Tennessee

The state of Tennessee provides a classic example of the taxes and administrative burdens placed on movers by the states. Tennessee requires all movers who enter within its boundaries to file an ad valorem tax report for the calendar year along with a financial statement. Tennessee's ad valorem tax is a property tax on real and personal property. The state's formula assesses the tax against one half the original cost of owned or leased property and against the full value of intangible assets, such as cash, account receivables, etc. The tax on this assessed value is apportioned on the basis of in state mileage compaed to total mileage.

There are several problems with the state's approach. First, how can a state justify taxing intangible assets, such as cash, that have been in a bank in another state the entire year? In addition, individual movers must deal with the administrative nightmare: every mover receives tax assessment from every city and county located in Tennessee. As a result a small mover operating in Tennessee may be required to make payments to approximately 100 taxing districts within the state. If every state within the continental United States followed suit, a small mover would be required to file 4,800 property tax returns. The only relief currently available is to litigate in each taxing jurisdiction, and that can be as expensive and burdensome as complying with the tax laws. Both of these alternatives are beyond the means of many small movers. Even large carriers often find it is more practical to pay than fight the system.

NATIONAL GOVERNORS' ASSOCIATION'S PROJECT

In 1985, the National Governors' Association (NGA) undertook a project on "Uniform State Procedures for Interstate Motor Carriers Taxation and Regulation." As part of that project, the National Association of State Budget Officers prepared a report entitled, "Survey of the States on How 'Mileage' is Defined and Used to Calculate State Taxes on Interstate Motor Carriers." That survey report, done after only 38 states had responded, was never finalized because it was already apparent that the definition of "mileage" differed greatly among the states. That study also disclosed that in several states, mileage was defined differently for different taxes.

The NGA report on "Uniform Registration and Taxation Approaches, Common Definition for Motor Carrier Taxes," Report No. 23, Part IV, August 25, 1986, recommended a uniform definition of both "In-Jurisdiction Miles" and "Total Miles," yet the states are still unable to even arrive at a concensus definition of a "mile" and how to use that one mile to fairly apportion the various taxes.

The NGA project on uniformity has failed the interstate motor carrier industry. The states cannot agree upon even the definition of the term "mileage." The attached Corporate Income Tax Chart for the Motor Carrier Industry, that was prepared by the National Accounting and Finance Council of the ATA, shows the variety of formulas currently used by the states for assessing corporate income tax on carriers. How can we expect the states to come up with a uniform scheme for taxation of interstate motor carriers.

AMERICAN MOVERS CONFERENCE RECOMMENDATIONS

The American Movers Conference supports all of the ATA's recommendations in their comments of September 16, 1988, and makes additional recommendations below with respect to household goods movers. The American Movers Conference recommends that Congress should:

1. Limit state and local operating taxes on interstate motor carriers to registration fees and fuel taxes. Taxes under this two structure system should be apportioned between states based upon actual use wihin a state. This system could be implemented through the existing International Registration Plan and the International Fuel Tax Agreement.

2. Limit state and local indicia for trucks to the "base state" vehicle license plate.

3. Prohibit states and local governments from imposing general business taxes on motor carriers which have no substantial business contact with the state. The AMC recommend that "substantial business contact" be defined as follows with respect to the household goods motor carriers: "Substantial business contact" between an interstate household goods motor carrier and a state, so as to justify the imposition of any tax, shall arise only in the motor carriers' state of domicile or in the state in which the major part of the carriers' operations are conducted.

4. Prohibit states and local governments from taxing the income or assets (tangible or intangible), of small motor carriers' except in the state of domicile or in the

BEST AVAILABLE COPY

state in which the major part of their operations are conducted. The AMC recommends that the threshold for what constitutes a "small" household goods motor carrier be defined as a business with revenues of less that $100 million.

Of the approximately 2,200 household goods carriers with operating authority in more than one state, only 7 carriers had gross revenues in excess of $100 million from interstate household goods carriage. Thus, the $100 million threshold for apportioning taxes between the states would relieve the administrative filing burden for over 2,190 small carriers who now have to file in as many as 48 states.

We doubt that state revenues will be adversely affected by eliminating apportionment for all but the large carriers. First, the gross revenue from those 7 carriers accounts for 62 percent of all interstate household goods revenue. While we do not have data on the geographical distribution of the remaining over 2,190 carriers, we believe that the revenue loss per state should be insignificant for several reasons: (1) state will collect additional revenue from domiciled carriers, and (2) the states, in addition to the carriers, should enjoy substantial administrative savings.

5. Prohibit states and local governments from cumulatively taxing an interstate motor carrier, truck driver, or household goods worker on more than 100 percent of income.

6. Prohibit states and local governments from levying a tax on the gross receipts, income, or assets, tangible or intangible, of interstate truck drivers and the workers providing services for such drivers or household goods motor carriers, except the worker's state of residence.

Within the household goods segment of the motor carrier industry, this provision would provide relief from having to file multiple state tax returns for over 5,000 agents and independent movers, an identified 26,000 owner-operators, and thousands of employee drivers and their helpers.

7. Prohibit local governments from taxing interstate motor carriers who do not maintain a permanent staff or substantial property within the locality.

8. Authorize motor carriers to enforce these federal standards and other federal remedies through the federal court system.

CONCLUSION

It is clear that the states, in their search for additional tax revenue, are increasing already tremendous burdens on small businesses. States are assessing small moving businesses, including individuals, for both current and retroactive taxes when it is questionable whether these companies, out-of-state movers, even should be required to file state returns. It is time for Congress to intervene.

OREGON DEPARTMENT OF REVENUE,
Salem, OR, September 14, 1988.

Subject: September 16th Hearing on the 4-R Act.

Hon. J. JAMES EXON,
Chairperson, Surface Transportation Subcommittee, Hart Senate Office Building, Washington, DC.

DEAR SENATOR EXON: I have asked Commissioner Nancy Ryles of the Oregon Public Utility Commission to deliver this letter to you. Commissioner Ryles is scheduled to testify before your committee during the September 16th hearing.

Attached to this letter are comments which describe the adverse effects on Oregon's property tax system caused by the April 28, 1987 Supreme Court decision on *Burlington Northern Railroad Co.* v. *Oklahoma Tax Commission.*

I urge your committee to consider the adverse impact on Oregon's property tax system caused by current interpretation of the 4-R Act.

Sincerely,

RICHARD A. MUNN,
Director.

Enclosure.

IMPACT ON OREGON'S PROPERTY TAX SYSTEM

NEED FOR AMENDMENT TO RAILROAD REVITALIZATION AND REGULATORY REFORM ACT (THE "4-R ACT")

On April 28, 1987, the United States Supreme Court decided *Burlington Northern Railroad Co.* v. *Oklahoma Tax Commission.* The Court held that the 4-R Act requires the federal courts to independently determine the true cash value of railroad

property within a state in order to decide whether the state assessing authority has discriminated against a railroad for property tax purposes. The effect of the Court's decision is to wrest from state authorities their ability to assure uniformity and fairness within the state property tax system. This is accomplished by granting to the railroads rights not available to any other taxpayer, namely:

(1) The right to have a federal court review the state's determination of the true cash value, i.e., market value, of an individual railroad's property and to have the federal court independently determine the level of assessment, i.e., the value, of that railroad property. Thus, the state administrative hearing and judicial procedures to which all other taxpayers are subject can effectively be bypassed when railroads file in federal court their objections for property valuations for ad valorem tax purposes.

(2) The right of preliminary injunction, by which the railroads can avoid paying the disputed portion of their property tax until the conclusion of litigation while all other taxpayers must pay first and then seek a refund (which is paid with 12 percent interest) if their assessment is reduced.

Federal district courts will now become the annual review board on state assessments of railroads. This is unfair to other classes of taxpayers and the budgets of local taxing districts, including schools, are disrupted pending a final disposition of the case. In Oregon, the difference in taxes between the roll value and the railroads' asserted value is approximately $1-4 million per year, per railroad—and all three major railroads have filed 4-R Act claims in federal court for 1985, 1986 and 1987. We expect 1988 cases to be filed this fall. In Kansas, the 4-R Act litigation took four years to resolve. During this period the railroads in Kansas obtained preliminary injunctive relief and withheld $24 million from Kansas counties. In Oregon, the current budget laws to not allow a taxing district to plan for this kind of short-fall in revenues.

The railroads were the sponsors of the 4-R Act. In response to concerns raised by state taxing authorities and critics of the 4-R Act, they assured Congress that the bill did not give the federal courts the right to redetermine true cash value once it has been decided by the state taxing authority. In a complete about-fact, the railroads argued to the Supreme Court that the language of the 4-R Act does allow federal courts to review a state's determination. Overlooking the clear legislative history of the 4-R Act and the inconsistent position of the railroads, the U.S. Supreme Court agreed.

With the ruling of the U.S. Supreme Court in *Burlington Northern* it is clear that the only way to give effect to the original intent of Congress in the 4-R Act—to require that all taxpayers be treated equally—is by amendment to the Act. An amendment to the Act to correct the intolerable situation created by the Court's ruling would leave the determination of the market value of the railroad property for the state assessing authority to decide. The assessment would, of course, still be subject to review through well-defined state administrative and legal mechanisms which in our state include the Oregon Tax Court and the Oregon Supreme Court.

The result of this U.S. Supreme Court decision has empowered federal district courts to sit as supreme boards of equalization, will allow railroads to avoid all state administrative and legal procedures which provide all taxpayers (including railroads) with a forum to contest their assessments. Also the budgets of school and other taxing districts will be disrupted.

In support to the Oklahoma Tax Commission's position in the U.S. Supreme Court case, 23 states and 50 California counties joined in amicus briefs to the court. Thus, there is widespread concern regarding this issue.

The 4-R Act must be amended by Congress to give effect to Congress' original intent—that there be equality of treatment of all taxpayers and that control of property tax assessments be returned to the states.

STATE OF MONTANA,
DEPARTMENT OF REVENUE,
Helena, MT, September 15, 1988.

Hon. JAMES EXON,
Chairman, Surface Transportation Subcommittee, Senate Committee on Commerce, Science, and Transportation, Hart Senate Office Building, Washington, DC.

DEAR SENATOR EXON: Please include the following comments in the record of your subcommittee's September 16 hearing on the property tax provision of the 4-R Act.

The property tax provision of the 4-R Act has been a constant source of litigation between the states and the railroad industry since it was originally enacted. As a result of court decisions the effect of the act is far greater than originally envisioned by Congress. The original purpose of the provision was to prevent property tax dis-

crimination against rail transportation. The provision has actually resulted in discriminatory treatment of other taxpayers because the railroads pay less than their fair share.

In Montana, the property tax "rate" at which the utilities such as Montana Power Company, Montana-Dakota Utilities, AT&T, U.S. West and other utilities pay is 12 percent. In 1987 the rate proposed for Burlington Northern was 10.64 percent. In 1988 the proposed rate was again less than 11 percent. Despite the lower rate, Burlington Northern brought suit in federal court.

However, the rate at which the railroads pay is only half the problem. As a result of a U.S. Supreme court case, *Burlington Northern* v. *Oklahoma Tax Commission* the federal courts are now in the business of determining the value of railroad property for state tax purposes. This has always been an area of state responsibility and authority which has not been usurped by the federal government. All other property taxpayers in the states have one administrative body or court system which hears their appeals. Uniformity and equity in property taxation is much easier to achieve when one body is looking at all of the appeals. Now, for the first time, an extraneous body, not familiar with the valuations of other taxpayers will be determining property valuation appeals. Uniformity will suffer and nonrail taxpayers will suffer discrimination. This is a huge mistake and certainly not something that was contemplated by Congress in enacting the property tax provision.

A third problem is the propensity of the federal courts to grant preliminary injunctions which prevent the local governments (counties, cities and schools) from receiving revenue owed to them by the railroads. In some cases, the revenue from the railroad is a significant portion of a school district's budget. A real hardship occurs when the federal court enjoins the collection of the money during lengthy litigation.

A fourth problem is the actual litigation itself. Litigation is always a poor way to settle tax disputes, particularly in 4-R Act cases. The major railroads are constantly in federal court litigating the 4-R Act with some state, utilizing attorneys and expert witnesses who literally make their living from 4-R Act litigation. The states lack the same expertise and resources. As a result, the railroads have been inordinately successful in the federal courts.

One final note on the impacts of the tax provision of the 4-R Act. It was originally aimed at property taxes but is now spilling over into other tax areas. Recent federal cases indicate that a state's entire system of taxation has to dance to the 4-R Act. Before making any decision concerning how it will raise revenues, a state must carefully consider the 4-R Act and how it will be impacted. As other large utility taxpayers watch the railroads enjoy favored tax treatment, they too will want federal protection. A Pandora's box of state tax issues are suddenly going to come before the Congress. Congress has enough issues to concern itself without getting into new areas which have previously been the sole province of the states.

In summary, no one could have predicted the far reaching effects of the 4-R Act when it was first enacted. It is not an exaggeration to say that the tax provision of the act, as interpreted by the federal courts, threatens state sovereignty. Congress must act to return control to the states. The states have no problem with a limited act insuring that railroads receive fair, uniform and equitable tax treatment. The states do have a problem when one industry receives favored tax treatment as a result of federal protection.

Sincerely,

JOHN D. LAFAVER,
Director.

THE
NATIONAL
INDUSTRIAL
TRANSPORTATION
LEAGUE

1090 Vermont Avenue, NW
Suite 410
Washington, DC 20005-4905
(202) 842-3870

PRESIDENT
Joseph S. Dewey
Director of Transportation
Kerr-McGee Corporation
P.O. Box 25861
Oklahoma City, OK 73125

VICE PRESIDENT
John W. Lind
Director Corporate Transportation
and Distribution
Corning Glass Works
Houghton Park A-3
Corning, NY 14831

TREASURER
Stanton P. Sender
Director of Legislative Affairs
Sears, Roebuck and Company
633 Pennsylvania Avenue, NW
Suite 600
Washington, DC 20004

CHAIRMAN
BOARD OF DIRECTORS
James E. Curtis
Manager of Domestic Distribution
U.S. Borax & Chemical Corporation
3075 Wilshire Boulevard
Los Angeles, CA 90010

VICE CHAIRMAN
BOARD OF DIRECTORS
Robert M. Concodren
Director Traffic
USS, A Division of USX Corporation
600 Grant Street
Room 460
Pittsburgh, PA 15230

EXECUTIVE VICE PRESIDENT
James E. Bartley
1090 Vermont Avenue, NW
Suite 410
Washington, DC 20005-4905

Office of the Executive Vice President

September 14, 1988

The Honorable J. James Exon
Chairman
Subcommittee on Surface Transportation
Committee on Commerce, Science
and Transportation
United States Senate
SH-428 Hart Office Building
Washington, DC 20510

Dear Chairman Exon:

The National Industrial Transportation League, the nation's oldest and largest shippers' transportation trade association, offers the following comments for your subcommittee's September 16 hearing record on the state taxation of interstate transportation.

The League has long been opposed to the discriminatory taxation of interstate transportation services. In fact, a longstanding League policy, Policy B-16. Discriminatory Taxation of Transportation, states, "The League opposes discriminatory taxation of transportation of any mode."

This policy is directly related to the League's dedication to ensuring that the nation benefits from the most efficient and economical national freight transportation system possible. This dedication also is evidenced in its Policy B-8. Limitation of Free Flow of Commerce, which states: "No local, state, or federal transportation laws or regulations should be established or retained which limit the free flow of commerce, to, from or within the United States."

While the League understands how states might view interstate freight transportation operations as an attractive source of funds in these times of increasingly scarce revenue dollars, it believes that such revenue raising attempts are detrimental in the long run.

While there can be short term gains to the states, i.e. revenues to meet the immediate budget crisis, the states are harming their economic base by adding additional burdens to the businesses and industries who produce, distribute, or transport goods in or through their borders. This harm occurs because transportation taxes ultimately are paid by the purchasers of these services.

A great deal of the 100th Congress's attention has been focused on the problem of global competitiveness and the need to help business and industry to better market U.S. goods both at home and abroad. However, it does U.S. business and industry little good to be relieved of onerous foreign practices if they are to be replaced by internal trade barriers, such as additional state levies for non-transportation purposes. In fact, it will require the elimination of both external and internal barriers if America is to regain her prominence in world commmerce.

Transportation costs are becoming an integral part of the cost formula which determines the marketability of U.S. goods. According to Business Week magazine, transportation is the number two consideration when a business makes plant location decisions. The first is general business climate. Thus, when states which seek to tax transportation operations, they are defeating their parallel efforts at economic development -- a Catch 22 which, in the long run, benefits neither the taxpayer nor the company trying to retain or expand its market share.

For these reasons, the League respectfully requests that your subcommittee take no action which could erode the interstate transportation modes' protections against this self-defeating economic activity. In fact, we would respectfully request that in the 101st Congress, your subcommittee work to assure that all modes are offered equal protection against these practices so that our goal of effective U.S. participation in domestic and international commerce becomes a reality.

Sincerely,

James E. Bartley
Executive Vice President

National Governors' Association

Gerald L. Baliles
Governor of Virginia
Chairman

Raymond C. Scheppach
Executive Director

September 15, 1988

The Honorable J. James Exon
Chairman
Subcommittee on Surface Transportation
Committee on Commerce, Science and Transportation
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to express the support of the National Governors' Association for your effort to modify section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act).

Modification of the property tax provision is needed to prevent railroad companies from challenging state property tax valuations directly in federal court -- bypassing state administrative and judicial systems -- and to prevent them from enjoining collection of the tax during litigation. The 4-R Act's unusually preferential treatment was upheld by the U.S. Supreme Court in its 1987 decision on Burlington Northern v. Oklahoma Tax Commission. The court said that Congress had discretion to assert federal jurisdiction over case-by-case railroad property tax assessments, and it already had done so in the property tax provision of the 4-R Act. The Court's decision made it clear that the states' only remedy is through legislative action.

In section 306(b), Congress declared that any state or local assessment ratios or taxation rates imposed on railroad property that differ significantly from the ratios or rates imposed on other commercial and industrial property constitute a burden on interstate commerce and are prohibited. In the Burlington Northern case, the state's railroad and commercial property tax rates were the same; the dispute centered on the valuation of the railroad's assets.

NGA's concerns with the current situation can be summarized as follows:

1) The federal courts are now in the business of determining the value of railroad property, since the Court broadened the law to allow the railroads to challenge their property tax valuation directly in federal court.

2) Section 306 also prohibits discrimination in other types of taxes; the railroads are pursuing cases ranging from personal property tax exemptions to income taxes.

3) The unusual practice of granting injunctive relief while cases are pending is extremely disruptive for local governments and school districts, which depend upon property taxes as a principal revenue source.

Allowing taxpayers to seek injunctive relief also goes against the federal policy of requiring prepayment of challenged taxes before seeking admission to federal district court, then allowing a refund should the challenge succeed. A court enjoined collection of taxes in Nebraska because state law exempted certain classes of commercial personal property. The state was found to have discriminated against rail transportation companies because they did not own the type of property that was exempted and therefore did not qualify for the exemption.

It appears that this matter adversely affects a number of states through the gradual erosion of state taxing authority. NGA has long advocated maintaining the taxing and other powers granted to the states. Attached is a copy of NGA's policy statement, Avoiding Federal Preemption of State Laws and Policies (A-4), which addresses state concerns with preempting state taxation methods and procedures. I would appreciate your inclusion of this letter and the NGA policy statement in the record of your hearing on this subject.

Sincerely,

Raymond C. Scheppach
Executive Director

AMERICAN BAR ASSOCIATION Governmental Affairs Office
1800 M Street, N.W.
Washington, DC 20036
(202) 331-2200

GOVERNMENTAL AFFAIRS OFFICE ABAnet 140
DIRECTOR Robert D. Evans ABAnet 186
STAFF DIRECTOR FOR GOVERNMENTAL LIAISON Craig H. Raab ABAnet 185
STAFF DIRECTOR FOR BAR LIAISON Kevin J. Driscoll ABAnet 463
STAFF DIRECTOR FOR MEMBER LIAISON Irene B. Emsellem ABAnet 461
LEGISLATIVE COORDINATORS Lillian B. Gaskin, Denise A. Cardman, E. Bruce Nicholson ABAnet 282
STAFF DIRECTOR FOR INFORMATION SERVICES Sharon Greene ABAnet 284
EDITOR, WASHINGTON LETTER Rhonda J. McMillion
STATE LEGISLATIVE COORDINATOR Patrick J. Sheehan ABAnet 463

September 23, 1988

The Honorable J. James Exon
Chairman, Subcommittee on Surface
Transportation
Senate Committee on Commerce
Dirksen Senate Office Building
Washington, D.C. 20510

Re: Oversight Hearings on State Taxation of Interstate Carriers

Dear Mr. Chairman:

I am advised that the Subcommittee held oversight hearings on September 16, 1988, on the subject of state taxation of interstate carriers. The purpose of this letter is to call to your attention a resolution adopted by the House of Delegates of the American Bar Association at the time the legislation on this subject, enacted as Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 USC § 11503, was under consideration. That resolution stated:

> Resolved, that the American Bar Association go on record supporting legislation which would declare unlawful and an undue burden on interstate commerce taxes levied by any taxing district on transportation property owned or used by a common carrier at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the taxing district....

The ABA continues to believe this position is valid and would oppose any revision of the statute inconsistent with this resolution.

We would appreciate your making this letter a part of the record of the hearings conducted by the Subcommittee and would welcome the opportunity to amplify our views at any future hearings.

Sincerely,

Robert D Evans

Robert D. Evans

CWTC
Chemical Waste
Transportation
Council

September 30, 1988

The Honorable J. James Exon
Surface Transportation Subcommittee
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

On behalf of the Chemical Waste Transportation Council (CWTC), I am requesting that the following be included in the official record of the September 16, 1988 hearing entitled, "State Taxation of Interstate Transportation".

The CWTC is a component of the National Solid Wastes Management Association. The Council serves as a forum for issues specific to the transport of hazardous waste. Members of the Council are commercial firms that have responsibility for transport of hazardous waste, by truck and rail, from its point of generation to its management destination. It is the only organization of its kind that represents companies engaged in hazardous waste transportation.

The members of the Council commend your initiative to begin a review of state taxation of interstate transportation. We are hopeful that the information you receive on this issue will prompt a more complete airing of the matter and remedial legislation during the coming Congress.

To understand our concerns about this issue, it is important to put into perspective how our industry fits into the communities you represent and in transportation generally. Only four percent (10 million tons) of all hazardous wastes generated are managed by commercial services. This constitutes less than one percent of all hazardous materials in transit. However, over 96 percent of waste generators depend on the services of commercial transportation. Our services are vital -- not only to large generators but also to every community that has a dry cleaner, auto body shop, photography development, and other small quantity generators without the option of disposing of their wastes on-site. Furthermore, we contribute to the national remediation effort by transporting materials removed from abandoned waste sites to commercial treatment and disposal facilities.

The volume of regulated material moved (less than one percent) does not reflect our true participation in the nation's transportation system, particularly that dealing with motor carriage. For example, in its latest Truck Use and Inventory Survey, the U.S. Census Bureau reported that 6.8 percent of the miles traveled by vehicles transporting hazardous materials involve toxic wastes. Such wastes were carried by only five percent of the total number of trucks transporting all hazardous materials. These data reflect three facts. Most hazardous waste is currently transported by truck with

NSWMA
A Council
of the National
Solid Wastes
Management Association

1730 Rhode Island Ave. N.W.
Suite 1000
Washington, D.C. 20036
(202) 659-4613

some movement by rail. To some degree many of the vehicles used, such as roll-off boxes and dump trailers, cannot be loaded to full capacity without violating bridge weight standards, increasing the number of trucks used. Most important for this discussion is the fact that hazardous waste transportation is an interstate operation, because of the limited number of permitted management facilities to which the wastes can be delivered.

It is with this perspective in mind that the CWTC wishes to endorse the remarks of the testimony presented by Thomas J. Donohue, American Trucking Association (ATA). His was an excellent presentation on the difficulties faced by all interstate motor carriers, no matter the vehicle type or cargo hauled. Nevertheless, the CWTC would urge you not to limit your inquiry to general operating and business taxes. We would encourage you to investigate all types of state transportation taxation.

A significant type of such taxation, not mentioned by any of the witnesses, is environmental taxes. Many of the same outcomes described in the ATA testimony, such as paperwork burden and discriminatory impacts on interstate transportation, also can be attributed to environmental transport taxation. The end result is a misallocation of limited resources from productive to non-productive pursuits -- a problem borne by all of our society.

While the problem of environmental transport taxation is just beginning to manifest itself for hazardous materials generally, state taxation of hazardous waste is a well established phenomenon. Last year the CWTC surveyed states to ascertain the extent of fees, taxes and other capital assessments being levied on hazardous waste transporters. Enclosed you will find a summary of those results. Let me emphasize four specific findings.

o State environmental transportation taxation is gaining momentum.

When the Council survey was conducted last year, thirty states assessed some type of fee or tax only on the transportation of hazardous waste. This compared with five states that levied fees for hazardous materials transport. (Keep in mind that hazardous waste is a subset in the definition of hazardous materials.) The Council is in the midst of updating our survey, as the numbers are increasing. For example, New Jersey just proposed to increase its hazardous waste transport fees from $50 a cargo unit to $500 per company and, depending on the type, up to $300 per vehicle.

The recent focus towards hazardous materials fees, for the most part, seems attributable to state concerns about financing activities mandated by P.L. 99-499, Title III, the Emergency Planning and Community Right-to-Know Act. The CWTC believes that it is premature to institute such fees and assessments prior to a thorough study of risks presented, existing response capabilities, and development of emergency plans to make best use of resources. These plans (required of Local Emergency Planning Committees by P.L. 99-499, Section 303) are due October 17, 1988, and have been

suggested as the basis for identifying resource needs. However, it must be emphasized that plans will focus on fixed facilities, not transportation incidents, per se. Both contribute to the need for emergency response training. Discussions of funding mechanisms, therefore, must address the relative risk and magnitude of potential problems presented by all contributors. Statistics from U.S. Environmental Protection Agency's Acute Hazardous Events Data Base, a sampling of sudden, accidental releases of toxic chemicals, show that 74% of all incidents and 65% of all associated deaths and injuries have occurred at fixed facilities. Moreover, the dollar damage from these fixed facility events far exceeds those costs related to transportation incidents.

- There is little relationship between the fees collected and the actual risks imparted by hazardous waste transporters.

Between the years of 1985 and 1987, the annual average collected through the 30 state taxing authorities was more than four million dollars. This figure does not include costs associated with various state bonding requirements. Meanwhile, U.S. Department of Transportation (US/DOT) data show that hazardous waste incidents account for less than one percent of all hazardous materials incidents. This is despite relatively heavy use of highway transport of waste (6.8%). The annual average reported dollar damage for all hazardous waste incidents in a ten-year period from 1977 to 1986 was $295,000. Moreover, according to the U.S. Congressional Office of Technology Assessment, the majority of hazardous materials releases occur during loading and unloading -- events unrelated to risk on the road. In addition, these taxes and fees do not consider Federal requirements (49 CFR 387) for liability insurance, including environmental restoration, set at five million dollars per occurrence with no annual aggregate limits.

- The tax schemes are Constitutionally suspect.

Mr. Donohue related that the American Trucking Associations v. Scheiner U.S. Supreme Court decision held that a $36.00 per axle tax was unconstitutional because it discriminated against interstate commerce. As the Court noted, a state tax on interstate commerce also violates the Commerce Clause, if it is not fairly apportioned. With one partial exception in Vermont, not one of the 30 state environmental tax schemes for hazardous waste transport is subject to apportionment or reciprocity. Whether operating in these thirty states for one day or for all 365 days, the same fee is paid. By allowing these discriminatory flat fees to continue, Congress is abdicating its responsibility to regulate interstate commerce equitably.

- State fees and taxes at currently assessed levels are arbitrary and capricious.

There is nothing uniformly rational about how the various fees and taxes are assessed. For example, charges per company run

BEST AVAILABLE COPY

between $20 and $500, and indicia per truck ranges from $10 to $500. Furthermore, funds were diverted to uses unrelated to improving safety in the transport of regulated materials. (Fees directed towards transportation safety programs are fully supported by the CWTC.) Instead, the use of these funds was primarily "general revenues", followed by deposit in state programs for cleanup of abandoned waste sites. Moreover, these fees and taxes are wholely unrelated to any benefits received by transporters of hazardous waste. The net effect of these fees and taxes creates barriers to market entry and penalizes legitimate business pursuits.

RECOMMENDATIONS

Given the number and diversity of taxation schemes, the CWTC believes it is necessary for the Federal Government to develop an equitable and efficient alternative that corrects the current Constitutional irregularities of state programs and harmonizes the legitimate needs of states to permit transporters operating in their respective jurisdictions. The Council would recommend a regulatory structure modeled on the Commercial Motor Vehicle Safety Act. In this model the Federal government would set standards to determine which taxes/fees are appropriate for company registration and vehicle indicia to transport hazardous materials, including waste. These hazardous materials "permits" would be treated as endorsements to the registration fees advocated as the first-tier in the ATA testimony. To qualify for an endorsement, companies must prove compliance with financial responsibility regulations and submit to a safety/fitness review. Endorsements would be periodically renewed, perhaps every three years. States would operate the program. Companies would pay once in a base state. All other states would have a reciprocal obligation to accept other state registrations. The fees would be sufficient to cover state administrative costs.

As a second tax tier to compensate for road usage, the ATA suggested apportioned fuel taxes. Building on that second tier suggestion, the Council believes that road usage is also a meaningful factor for emergency response purposes. Fuel tax returns are an appropriate basis for transporters to address their contribution to emergency response. First, Congress should require US/DOT to dovetail with the Community Right-To-Know requirements of P.L. 99-499 and endeavor to determine hazardous material flow and existing capabilities for emergency response during transport. This information will aide in prioritizing attention to those materials presenting the greatest risk in transportation, e.g., as explosives or materials toxic by inhalation.

Once needs for emergency response in transportation were assessed, the Federal Government should set a maximum registration fee that states would collect at the time of registration. Then using fuel tax returns, states would be reimbursed by the collecting states after audit to determine road use in their jurisdictions. All revenue would have to be dedicated to emergency response. Most of all, the Council supports the notion that emergency response

preparedness should be a cooperative effort among all levels of government. The Federal share would be an enhancement of state and local efforts. In this regard, the Motor Carrier Safety Assistance Program (MCSAP) may serve as a model. States that do not participate in the collection of revenues would not be eligible for receipts from other states.

The members of the Council firmly believe that they have an obligation to pay their fair share. However, an equitable process has not been developed to date. Clearly, if this issue is to be addressed, it will take some creative thinking. Your leadership and ability to focus attention on punitive transport taxes is vital. I appreciate the opportunity to submit these remarks and look forward to working with you and your staff in the future. If we can provide any further information, please let me know.

Sincerely,

Suellen Pirages,
Director

BEST AVAILABLE COPY

U.S. Department
of Transportation
**Federal Railroad
Administration**

Office of the Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

OCT 4 1988

The Honorable J. James Exon
Chairman, Subcommittee on Surface Transportation
Committee on Commerce, Science and Transportation
508 Dirksen Senate Office Building
Washington, D.C. 20510-6125

Dear Mr. Chairman:

Your Subcommittee recently held a hearing on Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), 49 U.S.C. 11503, which bars discriminatory state taxation of the railroads. Paragraphs (1) through (3) of Section 306 prohibit States and their subdivisions from engaging in de jure and de facto property tax discrimination; paragraph (4) prohibits any other form of state taxation that results in discriminatory treatment of a common carrier by rail.

The Department of Transportation supported enactment of Section 306 and we continue to believe that the provision is needed. When this Committee considered Section 306 in 1975, eight major railroads had gone into bankruptcy and the rest of the industry was in precarious financial condition, with return on investment industry-wide hovering between one and two percent. The financial plight of the railroads touched every employee, every shipper, and every community that depended on railroad service. Poor cash flows meant deferred maintenance, which translated into derailments, slow turnaround times, and generally unreliable service. While all shippers were affected by these conditions, rural shippers were unquestionably the hardest hit, as the railroads focused their limited resources on their heaviest density mainlines.

Discriminatory state taxation substantially contributed to the financial plight of the railroad industry in the early 1970's. Congressional analysis over a 15-year period revealed that railroads were being over-taxed by at least $50 million each year; this amounted to approximately 6% of the industry's net operating income ($835 million) in 1975. See H.R. Rep. 725, 94th Cong., 1st Sess. 78-80 (1975). States imposed discriminatory taxes in both the property and non-property areas. In the property area, discriminatory taxes generally took one of two forms: de jure discrimination, in which railroad property was taxed at different rates or assessed at different percentages of full value than other commercial property; and de facto discrimination, in which all property

was nominally taxed and assessed at the same rates and percentages, but railroad property was either overvalued or other commercial property undervalued. Discriminatory taxation in the non-property area took a variety of forms including state gross receipt taxes, excise taxes and burdensome regulatory fees. Ultimately the shippers and consumers bore the burden for the widespread discriminatory taxation by paying higher transportation costs and receiving poorer rail service. See S. Rep. 1085, 92d Cong. 2d Sess. 4 (1972).

Unfortunately, neither the Federal nor the state courts afforded the railroads adequate relief from discriminatory state taxation prior to the enactment of Section 306. For a discussion of the deficiencies of Federal litigation see 55 Transportation Practitioners Journal 219 (1988). The deficiencies commonly found in state court litigation included the necessity of bringing multiple suits (one in each county or other taxing jurisdiction) to secure complete relief, the delay in obtaining a decision, the limited form of relief available, and the reluctance of state courts to overturn decisions of the assessing agency. See S. Rep. 1483, 90th Cong., 2d Sess. 6 (1968).

Section 306 was enacted to eliminate all forms of state tax discrimination. It places railroad property on a par, for state tax purposes, with all other commercial and industrial property. Putting railroads on an equal basis with other businesses was sound, for as one court has observed, "[t]he only simple way to prevent tax discrimination against the railroads is to tie their fate to the fate of a large and local group of taxpayers." Kansas City S. R.R. v. McNamara, 817 F.2d 368, 375 (5th Cir. 1987).

Section 306 was carefully crafted to minimize Federal interference with state tax administration. First, States were given a 3-year grace period, ending February 1979, to adjust their tax practices to eliminate unlawful discrimination. Second, the statute prohibits a court from awarding relief unless the railroad property's assessment ratio exceeds the ratio for non-railroad property by at least 5 percent. Third, the statute adopted state law regarding the burden of proof, thereby generally imposing the burden of proving assessment discrimination on the owners of the rail property. Fourth, it also leaves in place Federal courts' ordinary equitable power to structure remedies so as to avoid unjustly burdening litigants. Finally, Section 306 does not undo an entire tax assessment but not only bars that portion of an assessment determined to be excessive under the assessment-ratio test, and thus protects state tax collection to the maximum extent possible, consistent with the need to eliminate discrimination. No compelling reason has been advanced either to repeal or

limit the scope of Section 306. Given the always pressing need to obtain adequate tax revenues and the tempting target that railroads present--as non-voting, often non-resident companies that cannot easily remove their assets--state taxing authorities will likely revert to discriminatory taxation of railroads if given the chance. The railroad industry is no more able to bear the financial burden of discriminatory state taxation now than it was in 1975. While the industry is financially stable for the first time in nearly three decades, it remains one of the least profitable American industries. The rail industry's return on investment for 1987 was 5.6 percent while its cost of capital was 11.6 percent. An industry that cannot generate a return on capital equal to the cost of borrowing is an endangered species. These figures emphasize the extent, and at the same time the fragility, of the industry's recovery. The progress is real, but reimposition of discriminatory state taxation could erode the progress that has been made and seriously threaten the long-term financial health and viability of the railroad system. Such a result would hurt the States, shippers, and consumers, particularly in rural areas.

We therefore urge the Committee to reject any calls for repeal or weakening of Section 306 of the 4R Act.

Yours very truly,

John H. Riley
Administrator

RICHARD J. BARBER ASSOCIATES, INC.
ECONOMIC COUNSEL

1828 L. Street, N. W.
WASHINGTON, D. C. 20036
(202) 785-0597

October 6, 1988

Honorable J. James Exon
Chairman
Surface Transportation Subcommittee
Committee on Commerce, Science and
Transportation
United States Senate
Washington, D. C. 20510

Re: State Taxation of Interstate Transportation

Dear Mr. Chairman:

In your Subcommittee's September 16 hearing dealing with state taxation of interstate transportation, many pertinent issues were identified. However, there is one crucial aspect of this subject -- the impact of a state's discriminatory taxes on persons in other states as well as on railroads -- which in my view warrants fuller examination. The consequences of such tax policies are particularly important in the case of rail transportation, with which I have been professionally involved during the past 20 years as a Government official and more recently as an economic consultant.

The essence of my concern is that a discriminatory state levy (and I emphasize that I am dealing here with taxes that can be shown to discriminate, not with reasonable state and local taxes fairly imposed) is, in substantial measure, ultimately borne by shippers and consumers in other states. Whenever a particular state levies a discriminatory tax, the burden is largely shifted to those in other jurisdictions who use rail transportation or purchase goods that move by rail. Absent the abililty of the taxpaying railroads to seek timely relief in the Federal courts -- as is provided for in Section 306 (49 U.S.C. 11503) of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act) -- the economic interests of shippers and consumers located outside of the taxing state could not be effectively asserted. Nor, of course, could

the railroads -- which must absorb at least a portion of the discriminatory tax burden -- obtain relief in their own right.

The key point is that railroads are to an overwhelming degree interstate transporters. The great bulk of their traffic -- and 90 per cent of the revenue they realize from freight carriage -- involves movements that originate in one state, typically are hauled across one or more state boundaries, and terminate in locations hundreds or even thousands of miles from the initial origin. Let me cite as examples the states of North Dakota, Nebraska, and Oregon, whose representatives appeared as witnesses before you on September 16. The most recent available statistics show that North Dakota originated just over one per cent of total U.S. rail freight tonnage and, of this, 85 per cent moved beyond its boundaries. Nebraska originated only 1.2 per cent, of which 90 per cent moved to other states. And Oregon originated just 1.3 per cent of total U.S. rail traffic, of which 87 per cent moved in interstate commerce. These illustrations are by no means atypical. No single state originates even as much as ten per cent of aggregate rail traffic and movements traversing state lines are the norm, as one would expect in an economy as large and geographically diffuse as ours. Moreover, rail routes that cross a state frequently carry large volumes of freight that originate and terminate elsewhere (e.g., thousands of carloads of California produce destined for markets in the East and Midwest move through other states, such as Nebraska and Iowa).

Thus, when any given state imposes a discriminatory tax on a railroad operating within its boundaries, the ultimate burden falls in large measure on those located elsewhere. Whatever the product involved -- be it manufactured (as an intermediate or final good), mined, or produced in the agricultural sector -- rail shipment is likely to be involved at some stage. Since discriminatory taxes constitute expenses for a railroad -- but do not enhance efficiency -- economics dictate that a sizable share will be passed on to rail customers. The effects then radiate outward until their burden finally comes to rest on consumers, most of whom will be outside the taxing state.

Because the composition of freight traffic carried by the railroads is large and diverse, the tax effects are broadly distributed. No one, no state, is sheltered from the consequences of a discriminatory levy imposed elsewhere. Discriminatory state taxes affect the delivered price of coal (and hence electricity), of farm products (grain, produce, processed foods, etc.), forest products (lumber and paper), and a near-endless list of manufactures (from autos and appliances to chemicals like fertilizers and plastics as well as any product that incorporates steel or other metals). Since the consumers of all these goods are scattered across the country, a discriminatory tax levied by one state is of broad national concern because of its external impact. People in, say, Illinois, New York, North Carolina, Ohio, or other states are aggrieved by a hypothetical discriminatory levy imposed in Nebraska, Iowa, or Oregon, no less than residents of these latter states would be if a

discriminatory tax were levied by Indiana, Michigan, Pennsylvania, or some other state.

These effects on consumers do not eliminate the adverse impact of discriminatory state taxes. Not all of such levies can be shifted forward to shippers and consumers because railroads must compete with transport modes that enjoy certain relative advantages (e.g., railroads must fund their investment needs while their less regulated competitors often benefit from Government aid). With intermodal competition constraining rail rates, some portion of discriminatory state taxation has to be shouldered by the railroads. This bears directly on Congressionally-declared policy regarding the rail industry.

During the last dozen years -- first in the 4-R Act of 1976 and later in the Staggers Rail Act of 1980 -- Congress found that the railroads were suffering from inadequate earnings. To put the industry on stronger footing -- and thereby enable it to invest in modernizing its facilities and equipment so as to better compete with other modes and serve shippers more efficiently -- Congress recognized that steps had to be taken to remove constraints that had contributed to railroad financial anemia. Many actions were taken to this end in the 4-R Act, among them the enactment of Section 306.

However, while the post-1976 experience reveals some small improvement in the railroads' position, the industry's earnings still leave it with sub-standard earnings. In 1987, the composite railroad rate of return was only 5.6 per cent, less than half the 11.6 per cent cost of capital as determined by the Interstate Commerce Commission. This deficiency in earnings hampers the railroads in their ability to invest, to price traffic competitively, and otherwise to contest with the other modes of freight transportation.

Discriminatory state taxes continue to work at cross-purposes with Congressional policy, as declared in Section 101 of the 4-R Act, by draining off funds that are crucial to the industry's financial revitalization. Burdened with a low rate of return but faced with large capital needs, railroads productively can use resources that would be siphoned off by discriminatory state taxes. Relief obtained under Section 306 is thus good for the railroads (and their shareholders), for their shippers, and for those businesses throughout the country that supply the railroads with capital assets (freight cars, computers, communications equipment, etc.).

Section 306 of the 4-R Act addresses the issue of discriminatory state taxes fairly and with procedural efficiency. If a railroad can carry its burden and successfully demonstrate discrimination, prompt relief is thereby made available. Absent this statutory provision, those who are adversely affected would have no way of gaining appropriate relief. Section 306, though, provides a railroad with the opportunity to secure redress not only on its own behalf, but also in a way that is

BEST AVAILABLE COPY

beneficial to others -- suppliers, shippers, and consumers -- who would otherwise be rendered voiceless. Retention of Section 306 is thus consistent both with the policy aims of the 4-R Act and with considerations of economic equity.

I request that this letter be included in the record of your hearings.

Respectfully,

RICHARD J. BARBER
President

○